

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

**DATE STAMP  
AND RETURN**

In the Matter of )

AT&T Services, Inc. and Southern New )  
England Telephone Company d/b/a )  
AT&T Connecticut, )

Complainants, )

v. )

Madison Square Garden, L.P. and )  
Cablevision Systems Corp., )

Defendants )

File No. CSR-8196-P

**FILED/ACCEPTED  
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Federal Communications Commission  
Office of the Secretary

**ANSWER TO PROGRAM ACCESS COMPLAINT**

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Defendants	)	
	)	

**ANSWER TO PROGRAM ACCESS COMPLAINT**

Madison Square Garden, L.P. ("MSG") and Cablevision Systems Corp. ("Cablevision") (collectively "Defendants"), pursuant to Section 76.1003(e) of the rules of the Commission,<sup>1/</sup> hereby submit this Answer to the Complaint filed by AT&T Services, Inc. and Southern New England Telephone Company d/b/a AT&T Connecticut ("AT&T" or "Complainant").<sup>2/</sup>

AT&T seeks relief that is unlawful, unnecessary, and unwarranted. In demanding government-mandated access to MSG HD and MSG+ HD, AT&T asks the Commission to disregard the language of the Cable Act and this agency's numerous prior orders holding that the program access rules do not apply to terrestrial programming. Even if MSG HD and MSG+ HD

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<sup>1/</sup> 47 C.F.R. § 76.1003(e).

<sup>2/</sup> *AT&T Services, Inc. and Southern New England Telephone Company d/b/a AT&T Connecticut, v. Madison Square Garden, L.P. and Cablevision Systems Corp., Program Access Complaint* ("Complaint"). Cablevision was served the Complaint via delivery on August 14, 2009. The Commission ordered Defendants to submit their Answer by September 17, 2009. *AT&T Services, Inc. and Southern New England Telephone Company d/b/a AT&T Connecticut, v. Madison Square Garden, L.P. and Cablevision Systems Corp., Program Access Complaint*, DA 09-1967 (rel. Aug. 28, 2009).

were subject to the program access rules, which they are not, AT&T offers no substantive evidence that its competitive viability is in any way harmed by its inability to provide a higher resolution of professional games and other sports programming that it already provides to its subscribers. The facts not only belie any claim by AT&T that it is hindered significantly or prevented from providing satellite-delivered cable programming, but also evidence substantial pro-consumer benefits from Defendants' distribution strategy for MSG HD and MSG+ HD. Further, the claims in the Complaint cannot be reconciled with AT&T's express release of the claims it now brings, and AT&T's continued wielding of exclusivity to strengthen its position as one of the largest wireless providers in the country. The law and the facts are clear: the Commission should dismiss AT&T's Complaint.

### **INTRODUCTION AND SUMMARY**

In the late 1990s Cablevision made a substantial and ground-breaking investment in high-definition ("HD") programming, taking an extraordinary financial risk to create one of the first HD channels in the country and commencing to produce and distribute local professional home games in HD. It did so at a time when there was virtually no demand for HD programming of any sort and only a handful of subscribers had HD sets. The undertaking required a significant investment in a new generation of HD equipment and facilities, and the dedication of substantially more bandwidth than necessary for standard definition programming.

Notwithstanding these risks, Cablevision saw MSG HD and MSG+ HD as a way to preserve and strengthen its identity as a leading-edge provider of advanced television features and capabilities. MSG HD and MSG+ HD represented a way not just for Cablevision to differentiate itself from then-existing video competitors like DBS; it also constituted an

investment in the future that would differentiate Cablevision from all video programming providers – cable and satellite.

At the time of launch, terrestrial delivery of MSG HD and MSG+ HD made far more sense than satellite transmission. Subscriber demand for HD programming was completely unproven, and no distributor other than Cablevision was interested in carrying the programming. Satellite delivery would have cost significantly more than terrestrial delivery, but MSG HD and MSG+ HD were able to launch with minimal signal delivery costs by utilizing Cablevision's existing terrestrial network. Terrestrial delivery also avoided bandwidth constraints and ensured higher picture quality for MSG HD and MSG+ HD.

Over a period of years, consumer demand for the programming rose slowly. HD television was slow to gain traction in the marketplace, and for five years there was little interest in carrying the programming from any other video distributor. But slowly and steadily consumer demand rose, and what once appeared to be an extraordinarily risky – and perhaps even foolhardy – investment in the future began to pay dividends for Cablevision.<sup>3/</sup>

Now, more than a decade later, the nation's largest communication company, AT&T – an entity with an enterprise value more than twelve times larger than Cablevision – is demanding that the government force Cablevision to share the fruits of its investment in MSG HD and MSG+ HD with perhaps its most formidable rival in the Connecticut video market. AT&T already carries the standard-definition (SD), satellite delivered MSG and MSG+ services, which include all of the professional games available on the HD services that are the subject of the

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<sup>3/</sup> Not all of Cablevision's investments in HD programming or other proprietary content have paid off. Cablevision invested hundreds of millions of dollars in Voom, launched as part of Rainbow DBS in 2003 that included 21 new HD channels developed by Cablevision's programming affiliate Rainbow Media, and carried in 1080i. The U.S. operations of the Voom channels, then distributed by VOOM HD Holdings LLC, were discontinued at the end of 2008. *See Rainbow Pulls Plug on Voom HD Service*, MULTICHANNEL NEWS, Dec. 18, 2008; *Loss at Cablevision*, NEW YORK TIMES, Feb. 27, 2009.

Complaint. But AT&T argues that the government should intervene in a highly competitive geographic video market and compel Defendants to provide its MSG HD and MSG+ HD program services to AT&T, even though those terrestrially-delivered services are not subject to the forced sharing arrangements of the program access rules.

AT&T's Complaint is without merit. As a threshold matter, AT&T is barred from bringing this Complaint because, in conjunction with the consummation of the 2007 license agreement for the satellite-delivered MSG and MSG+ services, it agreed to release Defendants from any claim related to access to MSG HD and MSG+ HD. Beyond this procedural bar, AT&T presents no cognizable claim under the program access rules.

*First*, the Cable Act and the FCC's rules flatly bar application of the program access rules to program services, like those at issue here, which are and always have been delivered terrestrially. MSG HD and MSG+ HD plainly do not constitute "satellite cable programming" as defined by the Cable Act, a fact acknowledged by AT&T representatives during negotiations with Defendants for other services. An unbroken line of Commission orders make clear that terrestrial programming is not subject to the program access rules, and the Complaint makes no effort to distinguish or otherwise address these precedents.

Earlier this year, in dismissing another program access complaint brought by AT&T based on the same flawed legal arguments, the Media Bureau reiterated that "under existing precedent, there is no basis for" granting relief for withholding of terrestrial programming.<sup>4/</sup> As the Bureau noted, access to terrestrial services is the subject of a pending rulemaking. Pending resolution of that proceeding, the proper disposition of AT&T's Complaint is dismissal – and the

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<sup>4/</sup> *AT&T Services Inc. and Pacific Bell Telephone Company d/b/a SBC California d/b/a AT&T California v. CoxCom, Inc.*, 24 FCC Rcd 2859, ¶ 13 (2009) ("AT&T/CoxCom Order").

Commission should reject AT&T's attempt to end-run that proceeding through adjudication of its Complaint before the Commission completes the open rulemaking.

*Second*, Section 628(b) does not give the Commission the authority to brand Defendants' lack of access to terrestrial programming a prohibited "unfair practice." The Commission has ruled repeatedly that Section 628(b) cannot be applied to outlaw conduct otherwise permitted under the Commission's rules. The D.C. Circuit's recent decision in *NCTA v. FCC* does not alter Commission precedent rejecting application of the program access rules to terrestrial programming. Nothing in that decision empowers the Commission to exercise jurisdiction over program services that Congress excluded from Section 628. To the contrary, the decision reinforces the Commission's obligation to give effect to the distinction between the regulatory treatment of satellite and terrestrial programming established by Congress. The D.C. Circuit's even more recent decision in *Comcast Corp. v. FCC*, finding that cable operators face "ever increasing competition," particularly in recent years, from DBS operators and phone companies that "have entered the market and grown in market share since the Congress passed the 1992 Act,"<sup>5/</sup> makes it all the more inappropriate to expand forced-sharing beyond the limits expressly set by Congress.

AT&T's argument that it is "unfair" for Defendants not to license MSG HD and MSG+ HD to AT&T does not make such conduct cognizable under the program access rules. Section 628(b) does not prohibit Defendants from employing a lawful pro-competitive strategy of product differentiation, simply because it may result in making AT&T's video offering less attractive to a subset of its potential customer base. Any holding to the contrary would

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<sup>5/</sup> *Comcast Corporation v. Federal Communications Commission*, Case No. 08-1114, 2009 Westlaw 2622763, \*6 (D.C. Cir. Aug. 28, 2009) ("*Comcast Corp. v. FCC*").



effectively outlaw product differentiation measures and exclusive arrangements commonly employed in the marketplace – and used by AT&T itself – which are widely regarded as beneficial for consumers.<sup>6/</sup>

AT&T also cannot show that its inability to license MSG HD and MSG+ HD results from an improper purpose or significantly hinders its ability to provide satellite programming. Cost, technical, and other legitimate business considerations drove the decision to use terrestrial delivery for MSG HD and MSG+ HD, and that decision was made years prior to AT&T's entry into the video market. Defendants are free to use these program services to differentiate themselves. That Cablevision has done so – at considerable financial risk and consistent with the well-established economic principle that a firm can choose the distributors for its products and services – provides no basis for Commission intervention. To the contrary, such product differentiation promotes competition and enhances consumer welfare.

AT&T likewise fails to meet its burden of demonstrating harm, to itself or to competition, from Defendants' alleged unfair practices. AT&T has not been denied access to any professional game shown on MSG HD and MSG+ HD, and it has not shown that lack of access to those services has had any discernable impact on its growth. Nor could it, as the number of AT&T U-verse TV subscribers continued to increase last year while company officials boast that U-verse TV is doing very well in Connecticut. As noted by Professors Bulow and Owen: "AT&T's complaint offers no evidence or theory explaining why, absent MSG HD and MSG+ HD, it cannot offer a competitively attractive and profitable video service to Connecticut viewers."<sup>7/</sup>

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<sup>6/</sup> As discussed below and in Jeremy I. Bulow and Bruce M. Owen, *Analysis of Competition and Consumer Welfare Issues in AT&T's Program Access and 628(b) Complaint Against Cablevision and Madison Square Garden* ("Bulow/Owen") (attached as Exhibit 1), it is precisely this sort of product differentiation that drives investment, innovation, and enhancement of consumer welfare.

<sup>7/</sup> See *id.* 7.

Further, AT&T's allegation that Defendants' decision not to license MSG HD and MSG+ HD contravenes "established [antitrust] standards" is based upon misreading and misapplication of relevant antitrust law and economic principles, which point decisively against the forced sharing AT&T seeks.

*Third*, while elsewhere acknowledging that MSG HD and MSG+ HD are and always have been delivered via terrestrial facilities, AT&T nonetheless groundlessly asserts that such programming should be properly classified as "satellite cable programming" for purposes of the program access rules. AT&T adduces no support for this assertion, because there is none.

*Fourth*, there are no grounds for AT&T's claim that the terrestrial delivery of these services should be branded as an "evasion" of the program rules (even assuming the Commission has authority over such "evasions"). Defendants' use of terrestrial delivery for MSG HD and MSG+ HD pre-dated AT&T's entry into the video market by more than seven years, and was driven by valid business considerations similar to those that previously have justified Commission rulings rejecting evasion claims. Defendants have always utilized terrestrial delivery for MSG HD and MSG+ HD, and it is not an evasion to continue to employ that method of delivery simply because, as a consequence, AT&T could not, upon its subsequent entry into the video market in Connecticut, gain access to those services pursuant to the program access requirements.

*Fifth*, AT&T alleges that Cablevision exercised "undue influence" over MSG's decision not to sell MSG HD and MSG+ HD to AT&T, but that prohibition applies only to satellite cable programming, which MSG HD and MSG+ HD are not. Further, Defendants' decision to use affiliated programming not subject to forced sharing under Section 628 as a competitive differentiator is not tantamount to Cablevision exercising "undue influence" over MSG's

decision not to sell MSG HD and MSG+ HD to AT&T. Congress did not intend for Section 628 to prohibit cable companies from having any involvement in licensing decisions by their subsidiaries, particularly with respect to programming not subject to the program access regime's forced sharing requirements.

*Sixth*, AT&T's contention that it is unlawfully discriminatory for Defendants to refuse to provide it with a license for the terrestrially-delivered MSG HD and MSG+ HD is without merit. The Commission's anti-discrimination rules cannot be invoked to obtain compelled access to programming that is not subject to Section 628. The fact that Defendants make terrestrially-delivered MSG HD and MSG+ HD program services available to some other distributors is not evidence of "discrimination" against AT&T, but instead reflects Defendants' rational and lawful choice of a means to differentiate themselves from other multichannel video programming distributors ("MVPDs").

*Seventh*, even if the Commission concluded that it had the authority to apply the restrictions of Section 628 to terrestrial programming, there is no justification to expand the scope of the program access law in a competitive marketplace such as the areas of Connecticut where AT&T competes with Cablevision. To the contrary, in such competitive markets, consumers are far better served by giving MVPDs the freedom to respond to marketplace forces by investing in new and innovative services.

*Lastly*, there is no basis for the Commission to impose penalties upon Defendants, as requested by AT&T, because Defendants have not violated any Commission rules in their program access dealings with AT&T or others.

## FACTUAL OVERVIEW

### **A. Launch of MSG HD and MSG+ HD.**

MSG HD and MSG+ HD were launched as terrestrial offerings more than a decade ago.<sup>8/</sup>

When it commenced offering home games played by the New York Knicks and New York Rangers in HD as part of MSG HD in 1998,<sup>9/</sup> Cablevision became the first regular provider of HD sports programming in the country.<sup>10/</sup> Even though few Americans had the capability to receive HD service,<sup>11/</sup> and HD television sets were “atrociously expensive” at the time,<sup>12/</sup>

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<sup>8/</sup> The first event televised over the Madison Square Garden Network was in 1969, and MSG+’s original predecessor, SportsChannel New York, was launched in 1976. Both MSG and SportsChannel New York featured games played by New York area basketball, hockey and baseball teams, and those services built up their audience base during the 1970s and 1980s through distribution over cable systems serving communities in New York, northern New Jersey and southern and western Connecticut. At that time, satellite delivery was a more cost-effective and technically efficient means of establishing a regional or national distribution footprint for a cable programmer than the microwave distribution that had previously been utilized in the industry. Fiber delivery was not even an option at the time, as fiber networks had not yet been built out to the extent necessary to allow delivery of MSG and SportsChannel New York to the bulk of viewers within their service area. Only later in the 1990s did fiber delivery become a viable alternative for distribution of these services, but migrating the services from satellite delivery would have created a number of issues – including contractual issues with affiliates and the services commitments with respect to transponder space. Declaration of Steven J. Pontillo at ¶ 13 (attached as Exhibit 2) (“Pontillo Declaration”).

<sup>9/</sup> MSG HD became available to subscribers during the 1998-99 NHL and NBA seasons, and MSG+ HD’s predecessor (Fox Sports Net New York HD) began showing games in high definition in 1999. MSG+ HD also was distributed terrestrially from its inception, for the same reasons as MSG HD. See Pontillo Declaration at ¶¶ 3, 11, 13-20.

<sup>10/</sup> See Press Release, Cablevision, Cablevision’s MSG Network To Be First Regular Provider of Sports Coverage in HD (October 27, 1998) (“Rangers games in HDTV will be historic telecasts and a perfect fit with Cablevision’s overall HDTV strategy . . . With the institution of state-of-the-art technology like HDTV, MSG will continue its tradition of providing the most innovative and creative telecasts. This is a tremendous opportunity to dramatically change the way that people watch television, sports in particular.”).

<sup>11/</sup> See, e.g., Dawn C. Chmielewski, *TV Maker Mitsubishi to Spend Millions to Digitize CBS Prime-Time Shows*, ORANGE COUNTY REGISTER, May 11, 1999 (discussing that fewer than 26,000 HDTVs had been sold in the entire U.S. by early 1999).

<sup>12/</sup> Peter H. Lewis, *Coming Soon to HDTV: New York’s Sports Teams*, NEW YORK TIMES, Dec. 3, 1998 (“[T]he current HDTV sets are atrociously expensive, costing many thousands of dollars. Only a

Defendants were willing to risk capital and resources deploying HD production and delivery capabilities -- at a time when few others in the industry were willing to do so.<sup>13/</sup> Absent Cablevision's willingness and desire to carry MSG HD, the service would not have launched in 1998. Cablevision viewed HD as an opportunity to distinguish itself in the marketplace, not just from DBS and its other competitors, but among all communications services companies.<sup>14/</sup>

1. The undertaking required significant up-front investment in next-generation HD cameras and production facilities and new signal processing and signal transmission equipment.<sup>15/</sup> Further, if consumer demand did, indeed, develop for MSG HD, additional investment in new customer premises hardware would be necessary.<sup>16/</sup> Moreover, satellite distribution of MSG HD and MSG+ HD was commercially impractical. Indeed, at that time satellite distribution of MSG HD and MSG+ HD would have required an entire transponder

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relative handful of people in New York City have bought them, and only a few HDTV programs have been broadcast.”).

<sup>13/</sup> See Transcript of News Hour with Jim Lehrer, *HDTV: Transforming TV*, Aug. 11, 1998, available at <http://www.pbs.org/newshour/bb/media/july-dec98/hdtv.html>. (quoting New York Times correspondent Joel Brinkley: “It’s going to take a while before the networks decide to do live programming in high definition, because they’d have to buy a whole new range of cameras and production equipment that are quite expensive. And the networks are just as curious as the rest of us to understand whether the public really wants this. They don’t want to spend all this money to buy all this production equipment to find perhaps two or three years from now that the public looks at high definition with a yawn.”).

<sup>14/</sup> Pontillo Declaration ¶ 7. Prior to distributing MSG HD terrestrially, Cablevision had gained experience with terrestrial distribution of affiliated local and regional programming services. In 1986, Cablevision launched News 12 Long Island, the world’s first 24-hour regional cable news channel. News 12 has been transmitted via terrestrial facilities from its inception, since the limited geographic market for the service made terrestrial delivery the most efficient means of distributing the service. Cablevision also launched the MetroChannels in 1998, a terrestrially-delivered suite of three local programming services designed to serve as a video and interactive version of a local newspaper. Until its discontinuance in 2005, Metro utilized Cablevision’s fiber optic transport network, which interconnects various system headends serving the tri-state area. *Id.* at ¶ 12.

<sup>15/</sup> Pontillo Declaration ¶ 8. See also Lewis, *supra* note 12 (“MSG . . . just purchased a pair of Lucent MPEG-2 Digital Video System encoders . . . signaling that it is serious about regular high-definition transmissions for sports and special events.”).

<sup>16/</sup> Pontillo Declaration ¶ 8.

because of the bandwidth intensity of HD programming.<sup>17/</sup> These costs would have added significantly to the uplink costs associated with satellite delivery,<sup>18/</sup> and it made no sense to incur them, given that the only distributor willing to carry the service, Cablevision, had an existing fiber network that could be utilized for delivery of these HD services.<sup>19/</sup> The economic and technical advantages of terrestrial delivery did not merely help to mitigate some of the risk associated with investing in expensive and unproven HD programming; in fact, they made it possible for Cablevision to roll out HD as early as it did.<sup>20/</sup>

2. During the initial years in which only Cablevision was providing MSG HD and MSG+ HD, utilizing Cablevision's existing internal network and fiber facilities was by far the most viable distribution option.<sup>21/</sup> The cost savings from terrestrial distribution were critical, given the substantial capital costs associated with introducing HD programming, continued uncertainty over the level of consumer demand for HD, and the tepid interest in distribution from other providers.<sup>22/</sup> In addition, the larger transmission capacity afforded by fiber delivery ensured that the new technical challenges associated with producing and distributing HD sports programming would not be exacerbated by bandwidth constraints.<sup>23/</sup>

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<sup>17/</sup> *Id.* ¶¶ 11, 14.

<sup>18/</sup> *Id.* ¶ 14.

<sup>19/</sup> *Id.*

<sup>20/</sup> *Id.* ¶ 11.

<sup>21/</sup> *Id.* ¶¶ 11, 14.

<sup>22/</sup> *See id.* *See also, e.g., Customers Unconverted to HDTV*, *NEWSDAY*, March 10, 2003 ("More than four years after high-definition service became available nationally, it is still a rarity in the nation's 105 million television households. . . . 'HDTV is still a profitless and theoretical activity in the United States,' said Josh Bernoff principal analyst at Forrester"); *id.* (noting that Time Warner "has not agreed to pay the license fees sought by other [HD] channels, including Discovery, HDNet and MSG Network").

<sup>23/</sup> Pontillo Declaration ¶¶ 18-19. Sports programming (whether in SD or HD) typically needs to be transmitted at higher bit rates and with less compression due to the fact that it features a great deal of fast action, detail, and quick camera movement.

**B. Terrestrial Distribution of MSG HD and MSG+ HD to Other MVPDs.**

3. In 1998, besides Cablevision and other existing cable operators, there were at least three other MVPDs serving the New York and Hartford DMAs. Not until MSG HD and MSG+ HD had been in operation for more than five years did any of these entities begin to express interest in providing MSG HD and MSG+ HD to their subscribers.<sup>24/</sup>

4. In 2005, MSG began to license MSG HD and MSG+ HD to certain MVPDs and, as with Cablevision, the services were delivered terrestrially. At that time, MSG determined that it did not make economic sense to change the established method of delivery of the services; in fact, it was more cost effective to continue using terrestrial delivery. Thus, the continued reliance on terrestrial delivery was a natural outgrowth of the services' origins as terrestrial offerings over a fiber-based network. MSG HD and MSG+ HD are terrestrially delivered via a fiber link for hand-off at designated pick-up points on a "come and get it" basis, whereby MVPD licensees arrange for pick-up of the signals at their own cost and expense. As a result, MSG's signal delivery costs for MSG HD and MSG+ HD are minimal.<sup>25/</sup>

5. By contrast, switching to satellite delivery would add up-front costs for additional satellite uplink equipment, and recurring monthly costs for leasing transponder capacity.<sup>26/</sup> Incurring these additional costs would make little sense, because one of the principal benefits to be gained from satellite delivery -- a broad geographic distribution footprint -- does not come into play with respect to distribution of MSG HD and MSG+ HD.<sup>27/</sup> In addition, terrestrial

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<sup>24/</sup> *Id.* ¶ 15.

<sup>25/</sup> *Id.* ¶¶ 16-17.

<sup>26/</sup> *Id.* ¶ 17.

<sup>27/</sup> As noted above, while the regional footprint of the satellite-delivered SD MSG and MSG+ services makes terrestrial delivery a potential distribution option, there are issues and constraints

distribution allows for the introduction of technical enhancements and advanced capabilities, including the eventual addition of two-way features, that are not practical in a satellite distribution model. For example, in 2001, Cablevision experimented with a two-way offering known as “Game Director,” which offered viewers the opportunity to choose from among multiple camera angles for certain games.<sup>28/</sup> Other vendors have similarly found terrestrial delivery of bandwidth-intensive HD networks to be more efficient than satellite delivery, even where a sister SD network is already delivered via satellite. For example, SportsNet New York (SNY) is distributed via satellite but SNY HD is distributed terrestrially.<sup>29/</sup>

**C. AT&T’s Entry into the Connecticut Market and Its Negotiations with MSG.**

6. AT&T first began providing video service to Connecticut residents in the last half of 2006,<sup>30/</sup> by which time MSG HD and MSG+ HD already had been in existence and terrestrially delivered for over seven years. The next year, AT&T and MSG finalized an affiliation agreement that licensed AT&T to distribute the satellite-delivered, standard definition MSG and MSG+ services.<sup>31/</sup> While AT&T also had requested a license to distribute the terrestrially-delivered MSG HD and MSG+ HD services during the negotiations, Defendants exercised their lawful right to decline that request, preferring instead to continue to utilize MSG HD and MSG+ HD as a product differentiator for Cablevision. During negotiations, AT&T

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associated with changing the mode of delivery of a service customarily delivered via satellite. *See supra* at n.8.

<sup>28/</sup> Pontillo Declaration ¶¶ 18-19.

<sup>29/</sup> *Id.* ¶ 17.

<sup>30/</sup> *See* Complaint, Exhibit 2, Joint Declaration in Support of Program Access and Section 628(b) Complaint, ¶¶ 8-9 (“AT&T Joint Declaration”).

<sup>31/</sup> Declaration of Adam Levine ¶¶ 5, 9 (“Levine Declaration”) (attached as Exhibit 3).



representatives acknowledged that Defendants are not legally obligated to license the terrestrially-delivered MSG HD and MSG+ HD to AT&T.<sup>32/</sup>

7. AT&T and MSG signed the agreement to carry the satellite-delivered, standard definition MSG and MSG+ services on October 17, 2007.<sup>33/</sup> That same day, AT&T and Defendants executed a mutual release of claims that discharged each party from liability for (among other things) all claims arising out of or relating to the issues in the negotiation of the October 17, 2007 agreement, including the terms, conditions, and provisions that are contained or that could have been contained in such agreement.<sup>34/</sup> AT&T launched MSG and MSG+ on the licensed Connecticut systems in late 2007, and has continued to provide those services to its subscribers of such systems in Connecticut since that time.

8. In July 2008, AT&T contacted Defendants to discuss obtaining a license to carry Rainbow HD networks – specifically AMC HD, IFC HD, WETV HD and Fuse HD.<sup>35/</sup> AT&T's specific request was to open negotiations toward AT&T obtaining "access to the satellite delivered HD simulcasts," and the AT&T representative specifically said that the focus of AT&T's request was "not [on] the terrestrial stuff."<sup>36/</sup> Nevertheless, AT&T subsequently attempted to insert a demand for terrestrially-delivered MSG HD and MSG+ HD into the negotiations. During negotiations, Defendants suggested they might be willing to provide AMC HD, IFC HD, WETV HD, and Fuse HD to AT&T in exchange for **[[begin highly confidential]]**

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<sup>32/</sup> Levine Declaration ¶ 7.

<sup>33/</sup> *Id.* ¶ 9.

<sup>34/</sup> *See id.* ¶¶ 9-10. The release is attached hereto as Exhibit 4.

<sup>35/</sup> *Id.* ¶ 11.

<sup>36/</sup> Levine Declaration ¶ 11.

[[end highly confidential]]<sup>37/</sup> AT&T rejected this proposal, but did state that it would consider agreeing to [[begin highly confidential]]

[[end highly confidential]] if it could distribute MSG HD and MSG+ HD, in addition to AMC HD, IFC HD, WETV HD, and Fuse HD.<sup>38/</sup> Defendants rejected this counteroffer and all subsequent attempts by AT&T to obtain a license for MSG HD and MSG+ HD as part of the ongoing discussions, consistent with Defendants' preference to limit the negotiations to the satellite-delivered HD programming AT&T originally sought in its negotiating request and their desire to continue to utilize MSG HD and MSG+ HD as a product differentiator for Cablevision.<sup>39/</sup> Negotiations between Defendants and AT&T for potential licensing of AMC HD, IFC HD, WETV HD, and Fuse HD are continuing.<sup>40/</sup>

**D. Competition in the Video Marketplace.**

9. AT&T provides service in competition with Cablevision in thirteen municipalities in southern Connecticut -- most of which are included in the New York Designated Market Area ("NY DMA") -- and seven communities in western Connecticut that are included in the Hartford, Connecticut DMA.<sup>41/</sup> Consumers in the areas where AT&T competes

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<sup>37/</sup> Levine Declaration ¶ 12. Rainbow Media Holdings, LLC is a programming and entertainment subsidiary of Cablevision Systems Corporation.

<sup>38/</sup> *Id.*

<sup>39/</sup> *Id.*

<sup>40/</sup> *Id.*

<sup>41/</sup> See Letter from Deborah Verbil, General Attorney, AT&T, to Kimberley J. Santopietro, Executive Secretary of the DPUC, Docket No. 07-10-04, *Application of The Southern New England Telephone Company for a Certificate of Video Franchise Authority* (filed July 23, 2009). The New York DMA Connecticut communities are: Greenwich, Stamford, New Canaan, Darien, Norwalk, Westport, Weston, Fairfield, Bridgeport, Stratford, Orange, Woodbridge, and Milford. Cablevision also competes directly with AT&T in the following Hartford DMA communities: Litchfield, Cornwall, Goshen, Torrington, Thomaston, Warren, and Morris, Connecticut.

with Cablevision are offered a choice of up to four video programming providers.<sup>42/</sup> The Commission has recognized that Cablevision faces effective competition in each of the Connecticut communities in which it operates, including every Connecticut community in which Cablevision competes with AT&T.<sup>43/</sup>

10. Although it entered the video market in Connecticut only three years ago, AT&T is already a formidable competitor in the Connecticut MVPD marketplace. AT&T is a corporate giant and the largest communications services company in the country, with an enterprise value of nearly \$224 billion and over 289,000 employees.<sup>44/</sup> AT&T is now the 10<sup>th</sup> largest video provider, and is growing rapidly, approaching an annual run rate of \$2 billion in revenue.<sup>45/</sup> In the second quarter of 2009, AT&T added 248,000 U-verse TV subscribers, giving it a total 1.577 million nationwide.<sup>46/</sup> AT&T Vice President of Video Services Jeff Weber recently commented that AT&T's "accelerated customer growth" shows that demand for AT&T U-verse TV "remains

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<sup>42/</sup> Many residents in Connecticut have the option to choose MVPD service from either Cablevision (or Comcast or Cox), AT&T, DirecTV, and Dish Network.

<sup>43/</sup> See *Cablevision of Litchfield, Inc. Petition for Determination of Effective Competition in Eight Connecticut Communities*, 23 FCC Rcd 16614 (2008); *Cablevision of Connecticut, L.P. and Cablevision of Southern Connecticut, L.P. Petition for Determination of Effective Competition in Various Connecticut Communities*, 23 FCC Rcd 8538 (2008).

<sup>44/</sup> Yahoo Finance, AT&T, Inc., Key Statistics, at <http://finance.yahoo.com/q/ks?s=T> (Last visited August 29, 2009); AT&T Second Quarter 2009 Investor Report, at 18 (Aug. 5, 2009) at <http://www.sec.gov/Archives/edgar/data/732717/000073271709000050/att2q0910q.htm>. By contrast, Cablevision's enterprise value is roughly \$17 billion, and the company has 17,000 full-time employees. Yahoo Finance, Cablevision Systems Corporation (CVC), Key Statistics, at <http://finance.yahoo.com/q/ks?s=CVC> (Last visited July 20, 2009); Cablevision Systems Corporation, 2008 Annual Report (Form 10K), at 26 (Feb. 26, 2009) available at <http://www.cablevision.com/investor/proxy.jsp>.

<sup>45/</sup> See Todd Spangler, *AT&T: 100,000-Plus Subs Through DirecTV In Q2, But Telco Reported Net Add Of 5,000 Satellite TV Customers In Period*, MULTICHANNEL NEWS, July 23, 2009; AT&T Investor Update, 2Q09 Earnings Conference Call Presentation, at 11 (July 23, 2009) <http://phx.corporateir.net/External.File?item=UGFyZW50SUQ9MjI5MDA5MnxDaGlsZE1EPTM0NDY0MnxUeXB1PTI=&t=1>.

<sup>46/</sup> See Todd Spangler, *AT&T: 100,000-Plus Subs Through DirecTV In Q2, But Telco Reported Net Add Of 5,000 Satellite TV Customers In Period*, MULTICHANNEL NEWS, July 23, 2009.

high even in challenging economic times.”<sup>47/</sup> Indeed, AT&T today reported that “U-Verse is doing better than expected,” with the company’s Chairman and CEO stating that AT&T’s video offering is performing “very well” and doing “everything I would have hoped that the product would have accomplished.”<sup>48/</sup>

11. AT&T entered the Connecticut video market in 2006 and has clearly emerged as a potent cable television competitor that continues to solidify and expand its position. AT&T reported that as of 2009 “370,000 households in Connecticut could get U-Verse” and that it “has ‘aggressive’ expansion plans” in the state.<sup>49/</sup> Its build out is steadily growing and AT&T now serves at least 96 communities throughout Connecticut, including 20 of the 24 municipalities in the state served by Cablevision.<sup>50/</sup> AT&T has heavily promoted its U-Verse service in Connecticut for three years.<sup>51/</sup> AT&T’s marketing and advertising campaigns have emphasized

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<sup>47/</sup> Press Release, AT&T, U-verse TV Starts 2009 with Record Quarter (Apr. 23, 2009).

<sup>48/</sup> Dave Hendrick, *AT&T chief talks U-verse, M&A*, SNL KAGAN, Sept. 17, 2009, <http://www.snk.com/InteractiveX/article.aspx?CDID=A-10063135-14388&KPLT=2>

<sup>49/</sup> Lynn Doan, *Now on Demand: Competition: AT&T is Poised to Fight a Full-Scale War with Cable Companies. But will the Prices Come Down?*, HARTFORD COURANT, May 24, 2009.

<sup>50/</sup> See *supra* at n.41.

<sup>51/</sup> See Peter Svensson, *In race with cable, AT&T pushes Discounted Bundle*, ASSOCIATED PRESS, Aug. 24, 2009 (reporting that AT&T has “started offering its first bundle discount for customers who combine its U-Verse TV service with wireless and broadband” and that it and Verizon are “competing with cable companies for video and Internet subscribers, and trying to emphasize their wireless networks as assets the cable companies can’t match.”); *AT&T Calls for Help: Hiring 100 People, 50 of Them to Sell U-Verse TV Service Door to Door*, HARTFORD COURANT, Aug. 12, 2009 (reporting that AT&T “has been selling the service through call centers, telemarketing, direct mail and a third-party contract sales force” and that Connecticut “was one of AT&T’s first U-verse markets and is among its strongest.”); Mark Peters, *Fonfara Criticized for AT&T Letter*, HARTFORD COURANT, April 5, 2008 (discussing a legislator’s letter to his constituents inviting them to an AT&T U-Verse marketing event); Mark Peters, *Soft-Serve: Selling TV Like Ice Cream; AT&T Is Pitching Its New Service Fact to Face, One Neighborhood at a Time*, HARTFORD COURANT, June 13, 2007 (discussing AT&T’s marketing efforts such as cruising neighborhoods in an ice cream truck, going door-to-door, inviting customers to free movies or concerts, and throwing parties at apartment complexes); *Stay Tuned for Cable Wars*, FAIRFIELD COUNTY BUSINESS JOURNAL, Jan. 8, 2007 (“AT&T is offering its U-verse service in parts of Danbury, Fairfield, Norwalk, Stamford and Trumbull.”). See also Exhibit 5, which contains a sampling

U-Verse's HD services and other differentiating features such as a "whole house" DVR offering, and special tie-ins with AT&T's exclusive iPhone and iTouch service arrangements.<sup>52/</sup> AT&T also is seeking to differentiate itself on the basis of its sports program offerings, asserting that "U-verse customers know that there's really only one way to watch TV, especially the big game,"<sup>53/</sup> and highlighting its carriage of the NFL Network and NFL Red Zone<sup>54/</sup> -- neither of which are carried by Cablevision on any of its systems.

## ARGUMENT

### I. THE CLAIMS IN THE COMPLAINT ARE BARRED BY THE TERMS OF THE OCTOBER 17, 2007 RELEASE EXECUTED BY AT&T

As a threshold matter, AT&T is barred from bringing this Complaint because, in conjunction with the consummation of the 2007 license agreement for the satellite-delivered MSG and MSG+ services, it agreed to release Defendants from any claim related to access to MSG HD and MSG+ HD. The release states that AT&T and Defendants agree to release one another from any and all claims, actions, damages, and liabilities "arising out of or relating to the issues" in (i) the program access complaint brought by AT&T in 2007 and (ii) the negotiation of the October 17, 2007 license agreement "including, without limitations, the terms, conditions, and provisions contained therein or that could have been contained therein."<sup>55/</sup>

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of AT&T advertisements and marketing materials that seek to differentiate U-Verse from Cablevision and other cable providers

<sup>52/</sup> See *infra* at 42-43, 52-55.

<sup>53/</sup> REUTERS, *AT&T U-verse TV Football Fans Score With Unique College Football Content* (Aug. 24, 2009).

<sup>54/</sup> Mike Reynolds, *Updated: AT&T, RCN Add NFL RedZone To Lineup, Telco Positions Service On HD Premium Tier*, MULTICHANNEL NEWS (Sept. 11, 2009)(reporting that AT&T will offer the NFL RedZone channel as part of its U-Verse HD Premium Tier, beginning Sept. 13").

<sup>55/</sup> See Levine Declaration ¶¶ 9-10; Exhibit 4.

As AT&T itself has acknowledged, the negotiations leading up to the 2007 agreement included a request by AT&T for a license for MSG HD and MSG+ HD.<sup>56/</sup> AT&T first requested a license for MSG HD and MSG+ HD in June 2007. When MSG declined that request, AT&T initially agreed to lay the issue aside.<sup>57/</sup> In October 2007, however, AT&T again requested a license for MSG HD and MSG+ HD, in the context of negotiations over carriage of the standard definition, satellite-delivered MSG and MSG+ services. Defendants again declined this request. The parties then finalized and executed the October 17, 2007 agreement and the release.<sup>58/</sup>

The broad and unambiguous language of the release therefore precludes AT&T from now raising a claim regarding access to the HD RSNs, which clearly “aris[e] out of or relat[e] to” the negotiations that led to the October 2007 license agreement. The release does not carve-out any potential license provisions, including access to the HD RSNs, that were not ultimately included in the agreement.<sup>59/</sup> Accordingly, AT&T is barred by the release from challenging the lawfulness of either the October 17, 2007 license agreement itself or of issues arising from the negotiation of that agreement, which included the disposition of AT&T’s request for a license for MSG HD and MSG+ HD.

The Commission has observed that “public policy requires that we avoid unnecessary regulatory interference regarding contracts entered into by consenting parties.”<sup>60/</sup> AT&T was certainly free to seek revisions to the release prior to signing it. AT&T even had a ready

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<sup>56/</sup> Complaint ¶¶ 42-44.

<sup>57/</sup> Levine Declaration ¶¶ 7-8.

<sup>58/</sup> See *id.* See also AT&T Joint Declaration ¶ 36.

<sup>59/</sup> The sole matter excluded from the ambit of the release concerned the parties respective positions in ongoing Federal court litigation regarding the nature of the authorization that AT&T was required to obtain from the Connecticut DPUC in order to provide its U-Verse video service. See Exhibit 4.

<sup>60/</sup> *EchoStar Communications Corporation v. Fox/Liberty Networks LLC*, 13 FCC Rcd 2184, ¶ 20 (1998) (“*EchoStar v. Fox/Liberty Initial Order*”).

opportunity to bring the matter to the Commission's attention contemporaneously, since it arose during the pendency of AT&T's 2007 program access complaint against Defendants<sup>61/</sup> – and AT&T had already demonstrated a willingness to use that opportunity as a forum to object to another condition sought by Defendants as part of the 2007 license agreement.<sup>62/</sup> Instead, AT&T signed the release and filed a motion to dismiss with the Commission noting that “[t]he parties have agreed generally to release each other from claims related to the dispute, while reserving their respective rights with respect to enforcing the agreement.”<sup>63/</sup> Having clearly raised the issue of obtaining a license to carry MSG HD and MSG+ HD during the 2007 agreement negotiations – and having just as clearly agreed to release Defendants from any liability arising out of or related to issues in the negotiation of that agreement (including provisions that could have been contained in that agreement) – AT&T is therefore precluded by the terms of the release from bringing the claims set forth in the Complaint.

## **II. THE PROGRAMMING AT ISSUE IS TERRESTRIAL AND THEREFORE NOT SUBJECT TO THE PROGRAM ACCESS REQUIREMENTS**

Each of the five counts of AT&T's Complaint is brought pursuant to the provisions of Section 628(b) and 628(c) of the Communications Act. Section 628(b) of the Communications

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<sup>61/</sup> Complaint ¶ 40.

<sup>62/</sup> There can be no suggestion that AT&T signed the release under duress or as the result of undue pressure. AT&T is a large, sophisticated company with ample resources and over a century of experience in the communications industry, and it retained outside counsel to represent it in the 2007 program access dispute. The 2007 program access complaint was still pending before the Commission at the time AT&T signed the release. In any case, a release cannot be avoided on the basis of duress or undue pressure where the allegedly coerced party chooses to enjoy the benefits of the underlying contract rather than to challenge the agreement that includes the release at its first opportunity. *See, e.g., VKK Corp. v. National Football League*, 244 F.3d 114, 122-123 (2d Cir. 2001) (holding that “[i]f the releasing party does not promptly repudiate the contract or release, he will be deemed to have ratified it.”); *In re Boston Shipyard Corp.*, 886 F.2d 451, 455 (1st Cir. 1989) (holding that, where one remains silent or acquiesces in a contract for a period of time after he has the opportunity to avoid it, he cannot then seek to avoid it based on duress).

<sup>63/</sup> Motion to Dismiss Program Access Complaint, CSR-7429-P, at 1-2 (October 18, 2007).

Act states that it is unlawful for a cable operator to “engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing *satellite cable programming* . . . to subscribers or customers.”<sup>64/</sup> Section 628(c) likewise imposes restrictions on the sale of “*satellite cable programming*” to multichannel video programming distributors.<sup>65/</sup> “Satellite cable programming” is “video programming which is *transmitted via satellite*.”<sup>66/</sup>

The plain language of section 628 limits its reach to programming that is delivered by satellite.<sup>67/</sup> MSG HD and MSG+ HD are not and have never been transmitted via satellite for receipt by any MVPD for retransmission to their subscribers. Instead, they are made available to MVPDs solely via terrestrial means. As detailed fully below, none of the claims set forth in the Complaint are cognizable under Section 628, because each requests that the Commission compel Defendants to provide AT&T with access to terrestrial programming services.

**A. The Complaint Seeks to Improperly Circumvent the Pending Commission Proceeding Addressing Access to Terrestrial Programming.**

AT&T argues that its Complaint should bypass the Commission’s established procedure of delegated enforcement of program access complaints by the Media Bureau because the “Media Bureau has previously determined that a complaint filed by AT&T seeking access to regional sports programming raised novel issues of first impression that the Bureau was not

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<sup>64/</sup> 47 U.S.C. § 548(b) (emphasis added).

<sup>65/</sup> 47 U.S.C. § 548(c) (emphasis added).

<sup>66/</sup> 47 U.S.C. § 548(i) (referring to 47 U.S.C. § 605(d)) (emphasis added).

<sup>67/</sup> See, e.g., *Caminetti v. United States*, 242 U.S. 470, 485 (1917) (“It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain . . . the sole function of the courts is to enforce it according to its terms.”); *Browder v. United States*, 312 U.S. 335, 338 (1941) (no argument has more weight in statutory interpretation than that a construction is within the plain meaning of the words of the statute).



authorized to decide on ‘delegated authority.’”<sup>68/</sup> In fact, the Media Bureau in that order did not identify any “novel issues,” but merely affirmed that inapplicability of the program access rules to terrestrial programming is well-established and that the Bureau has no authority to overturn those precedents.<sup>69/</sup> Indeed, grant of the relief sought in the Complaint would be particularly inappropriate because it would circumvent the pending Commission proceeding considering whether “it would be appropriate to extend our program access rules to all terrestrially delivered cable-affiliated programming.”<sup>70/</sup> The Commission’s framing of the issue in that proceeding implicitly acknowledges that its current rules do not apply to terrestrial programming, thereby warranting dismissal of the Complaint.<sup>71/</sup>

The Media Bureau relied on the Commission’s precedent and the pending 2007 NPRM when it recently dismissed AT&T’s program access complaint against Cox seeking access to a terrestrial programming service. The Bureau held specifically that because the issue of access to

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<sup>68/</sup> Complaint at 6.

<sup>69/</sup> *AT&T/CoxCom Order* ¶ 13. See *DirecTV, Inc. v. Comcast Corp.*, 13 FCC Rcd 21822, ¶ 25 (1998) (“*DirecTV Order*”); *EchoStar Communications Corp. v. Comcast Corporation*, 14 FCC Rcd 2089, ¶ 21 (1999) (“*EchoStar Order*”); *RCN Telecom Services of New York, Inc. v. Cablevision Systems, Inc. et al.*, 14 FCC Rcd 17093, ¶ 25 (1999) (“*RCN Order*”); *DirecTV, Inc. and EchoStar Communications Corp. v. Comcast Corp.*, 15 FCC Rcd 22802, ¶ 12 (2000) (“*Comcast SportsNet Order on Review*”); *RCN Telecom Services of New York, Inc., et al. v. Cablevision Systems, Inc. et al.*, 16 FCC Rcd. 12048, ¶¶ 14-17 (2001) (“*RCN Order on Review*”) (rejecting arguments that Section 628 may be applied to terrestrially-delivered programming); *Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act; Sunset of Exclusive Contract Prohibition*, 17 FCC Rcd 12124, ¶ 73 (2002) (“*2002 Program Access Order*”); *Everest Midwest Licensee v. Kansas City Cable Partners and Metro Sports*, 18 FCC Rcd 26679, ¶ 7, n. 34 (2003). (“*Everest Midwest Order*”) (“By its express terms, Section 628 of the Communications Act does not apply to terrestrially-delivered services.”); *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition*, 22 FCC Rcd 17791, ¶ 78 (2007) (“*2007 Extension Order & NPRM*”).

<sup>70/</sup> 2007 Extension Order & NPRM ¶ 116.

<sup>71/</sup> *Alaska Prof. Hunters Ass’n, Inc. v. FAA*, 177 F.3d 1030, 1035 (D.C. Cir. 1999) (“Once an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking.”).

terrestrial programming is under consideration “in the 2007 *Program Access NPRM*, we find that the rulemaking process, and not the instant adjudication, to be the correct forum for determining these issues.”<sup>72/</sup> Here, the case for relief is even less compelling than in *AT&T/CoxCom*, because AT&T actually has not been deprived of access to any local professional games. Just as the Bureau properly dismissed AT&T’s complaint against Cox pending resolution of the issue in the *NPRM*, the Commission should do the same here.<sup>73/</sup>

**B. The Commission’s Prior Rulings Make Clear that the Ambit of Section 628 Is Limited to “Satellite Cable Programming.”**

More than a decade ago, the Commission first held that “the correct reading of section 628 is that the [program access] provisions apply to satellite cable programming” only.<sup>74/</sup> The Commission has never retreated from that ruling, holding on numerous subsequent occasions that a vertically-integrated cable programmer that declines to sell terrestrial programming to an MVPD does not violate Section 628.<sup>75/</sup> Less than two years ago, the Commission again declined invitations from AT&T and others to expand the program access rules to cover terrestrial programming.<sup>76/</sup> Because Congress deliberately rejected applying the program access provisions

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<sup>72/</sup> *AT&T/CoxCom Order* ¶ 16.

<sup>73/</sup> AT&T attempts to preemptively dismiss arguments its Complaint is “an attempted ‘end run’ around the Commission’s pending rulemaking,” invoking what it claims is the “broad, statutory prohibition” against unfair competition in Section 628(b). Complaint at ii, n.2. But the Media Bureau addressed and properly rejected AT&T’s claim that the putative “breadth” of Section 628(b) could trump both the Commission’s unbroken line of precedent regarding the applicability of Section 628 to terrestrial programming, as well as the pending rulemaking. See *AT&T/CoxCom Order* ¶ 16.

<sup>74/</sup> *DirecTV Order* ¶ 25; *EchoStar Order* ¶ 21.

<sup>75/</sup> See *supra* at n.58.

<sup>76/</sup> *2007 Extension Order & NPRM* ¶ 78.

to non-satellite delivered programming,<sup>77/</sup> there is no statutory basis for applying those requirements to MSG HD and MSG+ HD.

Congress plainly chose to limit the scope of Section 628 by specifying that the statutory constraints applied only to a single category of programming: satellite cable programming.<sup>78/</sup> As the Commission observed in 1999: “In enacting Section 628, Congress determined that while cable operators generally must make available to competing MVPDs vertically-integrated programming that is satellite-delivered, they do not have a similar obligation with respect to programming that is terrestrially-delivered.”<sup>79/</sup> Rather, the statute evidences “a specific intention to limit the scope of the provision to satellite services.”<sup>80/</sup> Moreover, the specific Congressional directive to limit application of the program access requirements of Section 628 to “satellite cable programming” cannot be superseded by more general rulemaking authority set forth elsewhere in the statute.<sup>81/</sup>

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<sup>77/</sup> 2002 *Program Access Order* ¶ 73 (citing H.R. Conf. Rep. 102-862, 102nd Cong., 2nd Sess. 91 (1992)).

<sup>78/</sup> See *Nat'l Mining Ass'n v. Dep't of Interior* 105 F.3d 691, 694-95 (D.C. Cir. 1997) (general rulemaking provisions in statute “do not permit [agency] to trump Congress’ specific statutory directive in” Act and “regulate those not covered by” statutory provision); *Silvers v. Sony Pictures Ent., Inc.*, 402 F.3d 881, 885 (9th Cir. 2005) (Noting presumption “that when a statute designates certain persons, things, or manners of operation, all omissions should be understood as exclusions”). See also *Arc Ecology v. United States Dep't of the Air Force* 411 F.3d 1092, 1100 (9th Cir. 2005) (“[O]missions are the equivalent of exclusions when a statute affirmatively designates certain persons, things, or manners of operation.”); SUTHERLAND STAT. CONST. § 47.23 (“[W]here a form of conduct, the manner of its performance and operation, and the persons and things to which it refers are designated, there is an inference that all omissions should be understood as exclusions.”).

<sup>79/</sup> *RCN Order* ¶ 25.

<sup>80/</sup> *EchoStar Order* ¶ 21.

<sup>81/</sup> *Asiana Airlines v. FAA*, 134 F.3d 393 (D.C. Cir. 1998) (an agency “cannot rely on its general authority to make rules necessary to carry out its functions when a specific statutory directive defines [its] relevant functions . . . in a particular area.”); *Natural Res. Def. Council, Inc. v. Reilly*, 976 F.2d 36, 41 (D.C. Cir. 1992) (“[W]e have not allowed the general grant of [agency] rulemaking power . . . to trump the specific provisions of the Act.”).

As the Commission recognized, other indicia of Congress' intent support respecting Section 628's "satellite cable programming" limitation. The Commission found that "the legislative history of Section 628 . . . indicates that the version of the program access provision that the Senate adopted would have extended to terrestrially-delivered programming services but the House bill, that was eventually adopted, did not."<sup>82/</sup> Thus, not only is there no statutory language to support application of the program access rules to terrestrial programming, but the legislative history of the provision specifically proscribes such a step.<sup>83/</sup>

Under the language of the statute and the Commission's precedent, AT&T is not entitled to the relief sought in the Complaint.<sup>84/</sup>

### **III. DEFENDANTS HAVE NOT ENGAGED IN UNFAIR METHODS OF COMPETITION IN VIOLATION OF SECTION 628(b)**

In Count I of its Complaint, AT&T contends that Defendants unwillingness to license MSG HD and MSG+ HD constitutes "an 'unfair method[] of competition' or an 'unfair . . . act[] or practice[]' in violation of Section 628(b)."<sup>85/</sup> To establish a violation of Section 628(b), a

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<sup>82/</sup> RCN Order ¶ 26.

<sup>83/</sup> The Supreme Court has noted that "[f]ew principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) (finding enactment of House bill rather than Senate bill demonstrates that Congress rejected Senate's stricter language). See *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 200 (1974) (finding deletion of language in Conference Committee "strongly militates against a judgment that Congress intended a result that it expressly declined to enact").

<sup>84/</sup> Dismissal of the complaint also would avoid unnecessarily implicating the First and Fifth Amendment issues presented by imposing program access remedies on content providers in specific factual circumstances. See *Turner Broad. Sys., Inc. v. FCC*, 114 S. Ct. 2445, 2456 (1994); *Time Warner Entertainment Co., L.P. v. FCC*, 93 F.3d 957, 979 (D.C. Cir. 1996) (not precluding an "as applied" challenge to application of program access rules); *Keystone Bituminous Coal Ass'n v. Duncan*, 771 F.2d 707, 712 (3d Cir.), *aff'd*, 480 U.S. 470, 488 (1987) (governmental interference with the use of property can constitute a regulatory taking.). See also 2002 Program Access Order ¶ 45, n.138 (record evidence in different circumstances might render rules unenforceable).

<sup>85/</sup> Complaint ¶ 83.

complainant must demonstrate (1) unfair or deceptive acts and (2) that those acts had the purpose or effect of hindering significantly or preventing an MVPD from providing satellite cable programming to subscribers or consumers.<sup>86/</sup>

Because Defendants have full discretion to choose whether or not to license terrestrially-delivered MSG HD and MSG+ HD, there is no legal basis for the Commission to find that the decision not to license that programming to AT&T violates Section 628(b). As the Commission has held previously in rejecting section 628(b) claims seeking access to terrestrial programming, it is not “unfair or deceptive” for programmers to “exercis[e] competitive choices that Congress deemed legitimate.”<sup>87/</sup> Moreover, even if Section 628(b) could be construed to apply to the programming at issue, and Defendants’ conduct could be considered “unfair or deceptive” – neither of which is the case – AT&T would still be unable to establish a violation of Section 628(b) due to its failure to demonstrate that the purpose or effect of Defendants’ conduct was to hinder significantly AT&T’s ability to provide satellite cable programming.

**A. As a Matter of Law, Denial of Access to Terrestrial Programming Cannot Constitute an Unfair Practice that Violates Section 628(b).**

Section 628(b) states that it is unlawful for a cable operator to “engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming . . . to subscribers or customers.”<sup>88/</sup> “Satellite cable programming” is “video programming which is *transmitted via satellite*.”<sup>89/</sup>

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<sup>86/</sup> *AT&T/CoxCom Order* ¶ 12; *DirecTV Order* ¶ 32.

<sup>87/</sup> *EchoStar Order* ¶ 29; *DirecTV Order* ¶ 33.

<sup>88/</sup> 47 U.S.C. § 548(b).

<sup>89/</sup> 47 U.S.C. § 548(i) (referring to 47 U.S.C. § 605(d)) (emphasis added).

Under normal marketplace practices, firms are free to choose the distributors for their products.<sup>90/</sup> While Congress created a narrow exception to that norm in Section 628, that exception is limited to satellite-delivered programming. As the Commission has found on numerous occasions, the plain language of section 628(b) thus limits its reach to programming that is delivered by satellite.<sup>91/</sup>

Because neither MSG HD nor MSG+ HD meets the Act's definition of satellite cable programming, it is not -- as a matter of law -- an "unfair practice" for Defendants to exercise their lawful choice to be selective regarding the distributors of those services. "[A] practice permitted under the Communications Act and the Commission's rules cannot, without more, form the basis of a claim of unfair competition" under Section 628(b).<sup>92/</sup> Indeed, the Commission has held that exclusive agreements between programmers and cable operators that are not subject to the restrictions set forth in Section 628 constitute "a practice that Congress examined and did not consider anticompetitive."<sup>93/</sup>

In construing and applying Section 628(b), the Commission must give effect to the Congressional determination to exclude programming that is not delivered via satellite from the program access requirements. AT&T's attempt to cast as an "unfair practice" its lack of access to MSG HD and MSG+ HD squarely contravenes the Commission's ruling that Section 628(b)

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<sup>90/</sup> See, e.g., *Westman Comm'n Co. v. Hobart Int'l, Inc.*, 796 F.2d 1216, 1226 (10th Cir. 1986) ("Sound economic theory supports the cases that have allowed suppliers wide latitude in selecting their distributors."); *Orson, Inc. v. Miramax Film Corp.*, 79 F.3d 1358 (3d Cir. 1996) (upholding film distributor's grant of exclusive license for certain first-run films to film exhibitor).

<sup>91/</sup> See *supra* n.59.

<sup>92/</sup> *Dakota Telecom Inc. v. CBS Broadcasting, Inc. d/b/a Midwest SportsChannel and Bresnan Communications*, 14 FCC Red. 10500, ¶ 21 (1999) ("Dakota Telecom Order"); *EchoStar Order* ¶ 29.

<sup>93/</sup> *Dakota Telecom Order* ¶ 22.

“cannot be converted into a tool that, on a per se basis, precludes cable operators from exercising competitive choices that Congress deemed legitimate.”<sup>94/</sup>

AT&T claims that Section 628(b) can be applied in this instance because the programming being withheld is so critical that it “impairs AT&T’s ability to provide a competing video service (through which AT&T delivers satellite programming to consumers and subscribers).”<sup>95/</sup> Even if this claim were correct – which it is not – AT&T’s reading of the statute proves too much, for it would make all desirable terrestrially-delivered programming potentially subject to the program access rules should a competitor’s provision of satellite programming fail to meet with as much success as it would have if it had access to such terrestrially-delivered programming. If that were the correct meaning of the statute, however, there would have been no reason for Congress to limit the statute’s scope to “*satellite* cable programming.”

Further, AT&T’s argument has been tried previously and failed. After its program access complaint against Cablevision’s terrestrially-delivered MetroChannels was rejected by the Media Bureau, RCN filed an Application for Review to the full Commission. There, RCN argued that lack of access to terrestrial programming was actionable under Section 628(b) in circumstances where withholding impaired its ability to provide any satellite cable programming.<sup>96/</sup> The Commission considered and rejected RCN’s argument.<sup>97/</sup> As the recent *AT&T/CoxCom* Order expressly noted, “[n]or has the Commission granted relief pursuant to 628(b) under the theory that merely withholding terrestrial programming hinders or prevents the provision of satellite-

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<sup>94/</sup> *EchoStar Order* ¶ 29.

<sup>95/</sup> *Complaint* ¶ 88.

<sup>96/</sup> *Application for Review of RCN Telecom Services of New York, Inc.*, CSR 99-5404-P and CSR 99-5415-P, at 9 (filed Nov. 3, 1999).

<sup>97/</sup> *RCN Order on Review* ¶ 15.

cable programming.”<sup>98/</sup> AT&T’s attempt to subject MSG HD and MSG+ HD to Section 628(b) is simply not permitted under the statute or the Commission’s rules and precedents.

**B. The D.C. Circuit’s Decision in *NCTA v. FCC* Provides No Basis for Departing From Commission Precedent Holding that Section 628(b) Does Not Reach Lack of Access to Terrestrial Programming.**

AT&T cites the D.C. Circuit’s decision upholding the Commission’s ban on exclusive contracts in multiple dwelling units (MDUs),<sup>99/</sup> for the proposition that Defendant’s conduct in choosing not to license its terrestrial programming “violates Section 628(b) and the Commission rules irrespective of whether the HD format of MSG and MSG Plus is satellite cable programming.”<sup>100/</sup> AT&T’s argument is without merit.<sup>101/</sup>

First, nothing in the D.C. Circuit’s opinion offers any basis for allowing the Commission to override express and specific limitation on the scope of its authority in Section 628 established by Congress.<sup>102/</sup> The specific Congressional designation of the category of programmers covered

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<sup>98/</sup> *AT&T/CoxCom Order* ¶ 13.

<sup>99/</sup> *NCTA v. FCC*, 567 F.3d 659 (D.C. Cir. 2009) (upholding the *MDU Exclusivity Order*).

<sup>100/</sup> Complaint ¶ 88.

<sup>101/</sup> As a general matter, the D.C. Circuit’s decision conflicts with the language and intent of Section 628(b), which is clearly limited to acts or practices that restrict access to satellite cable programming. Defendants agree with the National Cable & Telecommunications Association that the broader construction of the statute adopted by the Commission in the *MDU Exclusivity Order* and affirmed by the court was legally erroneous, and incorporate by reference NCTA’s arguments in this regard in the appeal of that order. Defendants also note that the Commission is free to revisit the overbroad reading of Section 628(b) in the *MDU Exclusivity Order*, since the court merely affirmed that reading as reasonable under *Chevron*. As explained below, however, even if Section 628(b) is sufficient to support the *MDU Exclusivity Order* and was construed correctly with respect to the matters raised in *NCTA v. FCC*, the Commission still lacks the authority to grant AT&T the relief it seeks in this case.

<sup>102/</sup> *Hi-Craft Clothing Co. v. NLRB*, 660 F.2d 910, 916 n.3 (3d Cir. 1981) (Congressional intention to exclude certain class of persons from coverage under statute precluded agency from using regulatory authority to subject to statute a member of the excluded category); *Am. Petroleum Inst. v. EPA*, 52 F.3d 1113, 1119 (D.C. Cir. 1995) (agency “cannot rely on its general authority to make rules necessary to carry out its functions when a specific statutory directive defines [its] relevant functions . . . in a particular area”). See also *Teva Pharm. Indus. v. Crawford*, 410 F.3d 51, 55 (D.C. Cir. 2005); *Natural Res. Def. Council, Inc. v. Reilly*, 976 F.2d 36, 41 (D.C. Cir. 1992) (“[W]e have not allowed the general grant of rulemaking power . . . to trump the specific provisions of the Act.”); *Albany Eng’g Corp. v. FERC*, 548



by the program access provisions – vertically integrated, satellite cable programmers – precludes construing section 628 to apply to other non-designated entities, such as terrestrial programmers.<sup>103/</sup> As the D.C. Circuit noted in *NCTA*, an agency has no authority to construe a statute in a manner that would “render nugatory restrictions that Congress has imposed.”<sup>104/</sup>

Under AT&T’s distorted reading of the statute and the D.C. Circuit decision, the general prohibitions in Section 628(b) would negate Congress’ specific decision to exclude both terrestrial programming and non-cable owned programming from the ambit of program access. Such a result would contravene the court’s admonition that any action taken by the Commission under the unfair practices provision must comport with “Section 628’s actual words,”<sup>105/</sup> which do not authorize regulation of terrestrial programming.

*Second*, the circumstances giving rise to the *MDU Exclusivity Order* and affirmed by the D.C. Circuit as an appropriate exercise of the Commission’s authority under Section 628(b) differ markedly from the facts here. The D.C. Circuit affirmed the *MDU Exclusivity Order* because it held that Congress, in enacting Section 628(b), “focus[ed] not on practices that prevent MVPDs from *obtaining* satellite cable or satellite broadcast programming,” but on anti-competitive practices “that prevent them from ‘providing’ such programming ‘to subscribers or

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F.3d 1071, 1075 (D.C. Cir. 2008) (“Congress’s express provision for three types could hardly leave room for a FERC mandate of reimbursement of, say, the operational costs in dispute here. The maxim *expressio unius est exclusio alterius* has its limits, but we need not plumb them here.”).

<sup>103/</sup> *West Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 101 (1991) (courts may not construe statutes in a manner that enlarges their application when language plainly conveys a Congressional intention to limit their scope); *Louisiana Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374-75 (1986) (The Commission “may not confer power upon itself . . . to expand its power in the face of a congressional limitation on its jurisdiction”); *Ass’n of Am. R.Rs. and Wisconsin Cent. Ltd. v. Surface Transp. Bd.*, 162 F.3d 101, 104-05 (D.C. Cir. 1998) (rejecting agency’s effort to extend to “displaced” workers rights that statutory language showed were intended by Congress to be limited to terminated workers).

<sup>104/</sup> *NCTA*, 567 F.3d at 666 (quoting *AFL-CIO v. Chao*, 409 F.3d 377, 384 (D.C. Cir. 2005)).

<sup>105/</sup> *Id.*

consumers.”<sup>106/</sup> The court found that the MDU exclusivity ban ran afoul of Section 628(b) because it completely foreclosed a competing MVPD from providing any and all satellite cable programming to that building.<sup>107/</sup> Here, by contrast, AT&T is not prohibited from providing *any* satellite programming when the only programming being withheld is terrestrial. Unlike a case where MDU exclusivity placed all residents beyond the reach of AT&T’s cable network, Defendants’ reasonable business decision not to sell AT&T MSG HD and MSG+ HD does not foreclose AT&T from offering service (including *any* satellite-delivered programming AT&T carries) to any subscribers. To the contrary, it is indisputable that AT&T still provides hundreds of satellite programming channels to the many thousands of U-verse TV subscribers in Connecticut, notwithstanding its lack of access to MSG HD and MSG+ HD.

Extending Section 628(b) to terrestrial programming would be “taking unreasonably overbroad action to achieve an objective Congress never intended to authorize.”<sup>108/</sup> This is particularly true here since Congress expressly disclaimed any intention to regulate access to terrestrial programming. Congress did not intend – and the D.C. Circuit did not construe – Section 628(b) to preclude a cable operator from taking lawful actions that make its service more attractive and thereby “hinder” AT&T’s ability to provide satellite cable programming. The practice found by the court to be cognizable under Section 628(b) – exclusivity in cable MDUs – entirely foreclosed competing MVPDs from providing any service to any type of customers in MDUs. By contrast, AT&T asserts that Section 628(b) authorizes government regulation of a

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<sup>106/</sup> *Id.* at 664 (emphasis in original).

<sup>107/</sup> *Id.* (“[E]xclusivity agreements have both the proscribed ‘purpose’ and the proscribed ‘effect’ – cable operators execute them precisely so that they can be the sole company serving a building, and as petitioners themselves put it, ‘if you can’t serve a building then you can’t deliver satellite cable programming and satellite broadcasting programming.’”).

<sup>108/</sup> See *NCTA*, 567 F.3d at 666.

lawful competitive practice – terrestrial exclusivity – that may make AT&T’s service comparably less attractive to some subset of subscribers.<sup>109/</sup> This constitutes precisely the sort of overbroad application of Section 628(b) rejected in *NCTA v. FCC*.

*Third*, AT&T itself elsewhere has illustrated precisely why the rationale underlying the D.C. Circuit’s affirmance of the MDU exclusivity ban is completely inapposite here. In justifying its own exclusive practices to the Commission, AT&T asserted “[e]xclusive handset arrangements . . . merely enhance one competing carrier’s offer, much like better service, better call quality, fewer dropped calls, or a lower price.”<sup>110/</sup> It went on to state that:

Such arrangements do not foreclose any other carrier from offering any wireless service to anyone (or from working with manufacturers to sell or develop competitive phone offerings), and they certainly do not give any wireless carrier an out-and-out monopoly, as the MDU-access agreements did within the affected buildings.<sup>111/</sup>

AT&T’s argument aptly describes the distinction between Cablevision’s exclusive distribution of MSG HD and MSG+ HD (which does not foreclose any MVPD from providing any satellite programming) and MDU exclusivity (which forecloses all competitive MVPDs from providing any service). In this proceeding, however, the entire foundation of AT&T’s Section 628(b) claim rests upon its untenable conflation of these two markedly different circumstances.

*Fourth*, the Media Bureau’s recent decision in *AT&T/CoxCom* was issued well after the Commission’s decision in the MDU exclusivity order and the agency’s adoption of the

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<sup>109/</sup> In other words, as a result of an MDU exclusivity agreement, a consumer living in that MDU who *actually wants* to subscribe to the video service of a competing MDU is prohibited from doing so. That is not the case here: no consumer that *wants* to subscribe to AT&T U-verse TV is prevented from doing so as a result of the withholding of MSG HD and MSG+ HD.

<sup>110/</sup> *Petition for Rulemaking Regarding Exclusivity Arrangements Between Commercial Wireless Carriers and Handset Manufacturers*, RM 11497, Comments of AT&T, at 30 (filed Feb 2, 2009) (“AT&T Wireless Exclusivity Comments”).

<sup>111/</sup> *Id.*

construction of Section 628(b) that was upheld by the D.C. Circuit in *NCTA v. FCC*. Yet, notwithstanding the urging of AT&T at the time,<sup>112/</sup> the Media Bureau declined to construe the rationale underlying the MDU exclusivity order as authorizing any departure from the Commission's previous decisions regarding access to terrestrial programming. *NCTA v. FCC* offers no help to AT&T's Section 628(b) claim.

**C. AT&T Has Not – and Cannot – Demonstrate that Defendants' Decision Not to License MSG HD and MSG+ HD Violates Section 628(b).**

Even if section 628(b) applied to terrestrial programming – which it does not – AT&T has not demonstrated that Defendants' actions violate it. To constitute a violation of section 628(b), a cable operator must take actions that have the purpose or effect of hindering significantly or prohibiting a competitor from providing satellite video programming. AT&T's offers no support for its allegations with respect to any of the elements of a violation of section 628(b).

**1. The Complaint Fails to Show that AT&T's Lack of Access to Terrestrial Programming Was Animated by an Improper Purpose Rather than Pro-Competitive Product Differentiation.**

AT&T's claim that its lack of access to MSG HD and MSG+ HD was motivated by some improper purpose is wholly without support. AT&T asks the Commission to conclude that the program access rules prohibit competition among MVPDs to provide compelling content,<sup>113/</sup> but the Commission has repeatedly and consistently rejected claims that it is improper for a cable

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<sup>112/</sup> See *AT&T/CoxCom Order* ¶ 11.

<sup>113/</sup> See generally Complaint ¶¶ 55-77. See also *id.* ¶ 68 (“Competitive differentiation in this context . . . is but a euphemism for inflicting a competitive disadvantage on wireline rivals (such as AT&T).”).

company to differentiate itself from competing MVPDs by keeping for itself programming that is not subject to the program access rules.<sup>114/</sup>

As described in detail above, the decision to deliver MSG HD and MSG+ HD terrestrially predated AT&T's entry into the marketplace by several years and reflects a number of legitimate cost, technical, and business considerations.<sup>115/</sup> Indeed, AT&T did not even enter the Connecticut video market until more than seven years after both MSG HD and MSG+ HD had been established as terrestrial programming. Congress specifically permitted cable operators to decline to license affiliated terrestrial programming to their competitors.<sup>116/</sup> When, after years of operating these services, operators other than Cablevision became interested in distributing them, Defendants opted to take advantage of that statutorily-sanctioned choice afforded by Congress, and to continue to use MSG HD and MSG+ HD as a means of differentiating themselves in the marketplace – a standard competitive practice that increases consumer welfare by encouraging product innovation in a competitive market.<sup>117/</sup>

As in the *AT&T/CoxCom* program access dispute,<sup>118/</sup> AT&T argues that cable company product differentiation strategies involving affiliated programming not subject to the program access rules are anti-competitive.<sup>119/</sup> AT&T's arguments were properly rejected by the Media

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<sup>114/</sup> See *AT&T/CoxCom Order* ¶¶ 12-13; *RCN Order* ¶¶ 17, 25; *RCN Order on Review* ¶ 15; *DirecTV Order* ¶ 32; *EchoStar Order* ¶ 28.

<sup>115/</sup> See *supra* at 12-14; Pontillo Declaration ¶¶ 12-20.

<sup>116/</sup> See *supra* at 13-14; 30-31.

<sup>117/</sup> See Bulow/Owen at 2-3 (“Product differentiation is competition in ‘product space,’ and it is important to promoting consumer welfare.”).

<sup>118/</sup> *AT&T Services Inc. and Pacific Bell Telephone Company d/b/a SBC California d/b/a AT&T California v. CoxCom, Inc.*, CSR-8066-P, AT&T Complaint, ¶¶ 39-46, ¶¶ 65-66.

<sup>119/</sup> Complaint ¶¶ 66-67.

Bureau in the *AT&T/CoxCom* decision,<sup>120/</sup> and there is nothing in the Complaint to warrant a different result here. If anything, AT&T's improper purpose allegation is far weaker here, since, unlike the circumstances in the dispute with Cox, Defendants actually provide AT&T with access to all the local professional games carried on the HD programming services subject to the Complaint.

AT&T points to Cablevision advertisements, statements and marketing materials that highlight Cablevision's offering of MSG HD and MSG+ HD, but these do not evince an improper purpose.<sup>121/</sup> It is not improper for any firm to make lawful business decisions aimed at differentiating its products in the marketplace,<sup>122/</sup> and advertising is typically part and parcel of any differentiation strategy. Any contrary holding would effectively indict any competitive strategy designed to make a distributor's offerings more attractive than its competitors – an outcome clearly contrary to Congressional intent. As noted above, AT&T itself is trying hard to differentiate its video service offerings from those provided by Cablevision.<sup>123/</sup> There is certainly nothing untoward about Cablevision highlighting items that differentiate its service or alerting consumers to reasons for selecting its video offerings over AT&T's. To the contrary, as

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<sup>120/</sup> See *AT&T/CoxCom Order* ¶¶ 12-13.

<sup>121/</sup> Complaint ¶ 65.

<sup>122/</sup> PHILLIP AREEDA, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION 170 ¶ 1612c2 (1989) (explaining that product differentiation “represents a useful and desirable part of the competitive process” that “includes such clear public benefits as product diversity, genuine innovation, responsiveness to consumers, attention [and] service”); *Continental TV, Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 54-55 (1977); J. Thomas Rosch, Commissioner, Federal Trade Commission, Speech entitled “Perspective on Three Recent Votes: the Closing of the Adelphia Communications Investigation, the Issuance of the Valassis Complaint & the Weyerhaeuser Amicus Brief” (July 6, 2006) (“[E]xclusives can help firms differentiate themselves and compete more effectively. [Distributors] that were cut off from a RSN might compete harder with differentiated programming.”).

<sup>123/</sup> See *supra* at 17-18; see also *infra* at 42-43, 52-55.

AT&T itself has argued in other contexts,<sup>124/</sup> exclusivity and product differentiation are far more likely to promote competition and enhance consumer welfare than forced sharing arrangements.<sup>125/</sup> And, as stated by AT&T itself, “[e]xclusive marketing and distribution arrangements are simply one more form of beneficial product differentiation.”<sup>126/</sup>

Exclusivity is a standard practice in the media and communications business,<sup>127/</sup> and promotes consumer welfare by enhancing output and intensifying competition among both content creators and content distributors.<sup>128/</sup> There is nothing improper about Cablevision declining to share with AT&T programming that is not covered by the program access rules, even if the result may be that AT&T’s video program offerings may appear less attractive to

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<sup>124/</sup> See AT&T Wireless Exclusivity Comments at 8.

<sup>125/</sup> See Bulow/Owen at 16 (“Exclusivity to the extent permitted under the Cable Act, permits MVPDs to compete more vigorously by differentiating their products. Exclusivity can therefore increase both the quantity and quality of video programming (and thus, presumably, the diversity of program content) by increasing incentives to invest in programming.”). See also *infra* Section VI.A.

<sup>126/</sup> AT&T Wireless Exclusivity Comments at 8.

<sup>127/</sup> Bulow/Owen at 16 (“Exclusivity is particularly common in the sale of intellectual property rights, and is the norm, rather than the exception in the sale of video program distribution rights.”). See, e.g., *Orson, Inc. v. Miramax Film Corp.*, 79 F.3d 1358 (3d Cir. 1996) (upholding film distributor’s grant of exclusive license for certain first-run films to film exhibitor); *Three Movies v. Pacific Theaters, Inc.*, 828 F.2d 1395 (9th Cir. 1987) (upholding summary judgment where defendant allowed only one of two competitors first-run movie rights); *In re Independent Serv. Orgs. Antitrust Litig. CSU, LLC v. Xerox*, 203 F.3d 1322, 1328 (Fed. Cir. 2000) (“[T]he owner of a copyright, if it pleases, may refrain from vending or licensing and content [itself] with simply exercising the right to exclude others from using its property”).

<sup>128/</sup> See Bulow/Owen at 16-20. The Commission noted in the most recent extension of the satellite programming exclusivity ban that it “recognizes the benefits of exclusive contracts and vertical integration . . . , such as encouraging innovation and investment in programming and allowing for ‘product differentiation’ among distributors.” 2007 Extension Order & NPRM ¶ 63. See also *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution and Carriage*, 8 FCC Rcd 3359, ¶ 63 (1993) (“Program Access First Report and Order”) (“As a general matter, the public interest in exclusivity in the sale of entertainment programming is widely recognized.”).

some small segment of customers.<sup>129/</sup> That is the essence of a competitive marketplace. As AT&T itself has explained:

Exclusive arrangements are commonplace in competitive markets, and it is widely accepted in both economics and the law that they generally provide important benefits to consumers. In every competitive marketplace, each competitor strives to gain advantages over its rivals both to attract new customers and to retain existing ones. . . . In each case, the goal is to gain an edge on rivals through superior offerings. Carriers that make the right choices begin to win customers from other carriers. Carriers that do an especially good job of creating advantages for themselves may win new customers at a fast clip, and that forces rivals to work harder to improve their own offerings. This rivalrous behavior is the essence of competition, and it is a *good thing*.<sup>130/</sup>

Implicitly acknowledging that its high-profile use of iPhone exclusivity to cement its strength in the wireless market conflicts with its position in this proceeding, AT&T inconsistently attempts to portray *Defendants'* use of exclusivity and product differentiation as harmful while describing its own exclusive arrangements as pro-competitive. According to AT&T, the difference is that "no amount of investment or innovation can result in RSN programming comparable to" MSG HD and MSG+ HD<sup>131/</sup> -- but AT&T's argument is a red herring: it already carries the standard definition, satellite delivered MSG and MSG+ services, which include all the professional games shown on MSG HD and MSG+ HD.<sup>132/</sup> If anything, AT&T's iPhone exclusivity more closely resembles the lock-up of a unique asset by a sector's

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<sup>129/</sup> Bulow/Owen at 3. ("The traditional analysis starts from the premise that all successful competitive strategies harm competitors. That is why harm to competitors is not useful in deciding whether a strategy harms competition.")

<sup>130/</sup> AT&T Wireless Exclusivity Comments at 7-8 (filed Feb 2, 2009) (emphasis in original).

<sup>131/</sup> Complaint at n.54.

<sup>132/</sup> Bulow/Owen at 4. In any event, competitive markets do not require competing firms to offer identical products. As Professors Bulow and Owen point out, "The issue, of course, is not whether AT&T could offer a service identical to MSG HD and MSG+ HD . . . . Rather, the relevant question from an economic perspective is . . . whether AT&T can effectively compete against Cablevision if it cannot offer its subscribers MSG HD and MSG+ HD." *Id.* As described elsewhere, AT&T is able to compete effectively without MSG HD and MSG+ HD. See *supra* at 12-13; see *infra* at 42-43, 52-55.



market leader, since, due to patent protections “no amount of investment or innovation” could exactly duplicate AT&T’s iPhone offering.<sup>133/</sup> If, as AT&T of course contends, there is nothing anticompetitive about its iPhone exclusivity, *a fortiori* Cablevision’s licensing strategy for MSG HD and MSG+ HD – which includes licensing to some Cablevision rivals – is pro- rather than anticompetitive.

AT&T also attempts to distinguish its exclusive arrangements by arguing that Cablevision “faces nothing like the intense competition evident in both the wireless and consumer electronics manufacturing industry.”<sup>134/</sup> As the D.C. Circuit recently confirmed, this is an obsolete view of the state of competition in video programming.<sup>135/</sup> The competition faced by Cablevision is just as formidable -- if not more so -- than that encountered by AT&T in wireless. While AT&T competes in wireless from its perch as the largest communication company in the country and the leading provider of wireless service, Cablevision must compete against the nation’s two biggest communications service providers, AT&T and Verizon, which enjoy annual revenues that are at least 15 and 10 times larger respectively than Cablevision.<sup>136/</sup> Cablevision also competes against the 2<sup>nd</sup> and 3<sup>rd</sup> largest MVPDs in the country, DirecTV and Dish Network,

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<sup>133/</sup> AT&T also errs by suggesting that its exclusive iPhone arrangement is materially distinct from -- and inherently more competitive than -- any exclusivity between Cablevision and MSG. Complaint at n. 54. As Professors Bulow and Owen point out, the analysis of the consumer benefits accruing to exclusivity arrangements “is largely independent of whether the seller is vertically integrated with one of the buyers in the market.” Bulow/Owen at 19.

<sup>134/</sup> Complaint at n.54.

<sup>135/</sup> See *Comcast Corp. v. FCC*, 2009 Westlaw 2622763, \*6 (“First, the record is replete with evidence of ever increasing competition among video providers: Satellite and fiber optic providers have entered the market and grown in market share since the Congress passed the 1992 Cable Act, and particularly in recent years. Cable operators, therefore, no longer have the bottleneck power over programming that concerned the Congress in 1992. Second, over the same period there has been a dramatic increase both in the number of cable networks and the programming available to subscribers”).

<sup>136/</sup> See Yahoo Finance, Verizon Communications Inc. (VZ), AT&T, Inc. (T), and Cablevision Systems Corporation (CVC) (Last visited September 16, 2009).

each of which has at least 4 times as many subscribers as Cablevision.<sup>137/</sup> The portions of Connecticut where Cablevision and AT&T both compete are highly competitive, as evidenced by the Commission's determination that Cablevision faces effective competition in all parts of Connecticut where it provides service.<sup>138/</sup>

Cablevision always has viewed itself as a provider of information and entertainment services to subscribers, rather than as simply the owner of a conduit.<sup>139/</sup> It wins and retains subscribers by distributing – but also by investing in and developing – programming content that viewers want to see. Developing a cable programming service is expensive, resource-intensive, and replete with risk. For every program content investment that succeeds, there are others that fail to pan out. Since 2005, two substantial program service initiatives developed and launched by Cablevision, Metro and Voom, were shut down.<sup>140/</sup> Hence, it is unsurprising – and, in a competitive environment such as southern Connecticut, entirely proper – that Defendants should

<sup>137/</sup> *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Thirteenth Annual Report*, 24 FCC Rcd 542, Table B-3 (2009) (“2009 Video Competition Report”).

<sup>138/</sup> *See supra* n.45. Nor is there any merit to AT&T's intimation that exclusive arrangements involving vertically-integrated cable programming cannot spur innovation. In fact, the Commission itself has recognized the benefits of cable exclusivity. *See e.g. New England Cable News*, 9 FCC Rcd 3231, ¶ 34 (exclusivity may “attract investment, carriage and support of [a programming] service”); *id.* ¶ 40 (“exclusivity may promote diversity in the programming market when used to provide incentives for cable operators to promote and carry a new and untested programming service”); *see also* Bulow/Owen at 19-20 (describing development of the Fox broadcasting network via the use of exclusive programming).

<sup>139/</sup> In 1973, Cablevision's chairman, Charles F. Dolan, recognized the opportunity to use cable's increased channel capacity to develop new, non-broadcast programming content for cable, and created the first premium movie service, HBO, and, shortly thereafter, the first regional sports programming service, SportsChannel. Cablevision's programming affiliate, Rainbow Media, developed a number of successful programming services, including American Movie Classics, Bravo, the Independent Film Channel (IFC) and the Women's Entertainment (WE) network. In addition, Cablevision took the lead in developing other local and regional programming, including News 12, which launched in 1986 as the world's first 24-hour regional news channel. In 1998, Cablevision began offering the MetroChannels, a terrestrially-delivered suite of three local programming services designed to serve as a video and interactive version of a local newspaper. None of the services would have been brought to the market place had Cablevision viewed itself as nothing more than a retransmitter of programming developed by others.

<sup>140/</sup> *See* Pontillo Declaration ¶¶ 5, 12.

exercise their lawful choice to retain for themselves the fruits of their successful investment in HD sports programming, rather than share it with one of their fiercest rivals.

The Complaint states that “absent an interest in thwarting AT&T’s competitive entry,” Defendants “would have every economic incentive to license” MSG HD and MSG+ HD to AT&T, and that failure to do so sacrifices short term benefits and is “rational only if there is an anticompetitive effect on AT&T.”<sup>141/</sup> Defendants have no hope or intention of thwarting AT&T’s competitive entry into video; they are simply attempting to distinguish their video offerings in a manner authorized by Congress. The Complaint offers no support for the claim that Defendants product differentiation strategy “will be profitable for MSG/Cablevision only in the long run by eliminating AT&T and other MVPDs as effective competitors.”<sup>142/</sup> That Defendants did not agree to AT&T’s offer to **[[begin highly confidential]]**

**[[end highly confidential]]**

cannot be considered a cognizable “sacrifice” of benefits.<sup>143/</sup> In any event, virtually all exclusive distribution arrangements “sacrifice” revenue from alternative potential distributors; but that does not render such arrangements anti-competitive, because there are offsetting procompetitive benefits.<sup>144/</sup>

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<sup>141/</sup> Complaint ¶¶ 62, 70.

<sup>142/</sup> Bulow/Owen at 12.

<sup>143/</sup> See Bulow/Owen at 11-12.

<sup>144/</sup> See Bulow/Owen at 5 (“A selective licensing strategy simply takes account of the effects of using particular distributors, both on programming revenue and video distribution costs and revenue.”).

Defendants and AT&T compete fiercely to attract and win video programming subscribers in Connecticut. Each company is employing a range of strategies to differentiate its product offerings from one another, a standard practice in a competitive marketplace. The fact that these strategies may adversely affect rival video providers does not evidence any sort of improper purpose, since “most successful competitive strategies harm competitors. That is why harm to competitors is not useful in deciding whether a strategy harms competition.”<sup>145/</sup> Defendants regard MSG HD and MSG+ HD as a worthwhile way to differentiate the Cablevision video product offering from U-Verse TV, and Congress specifically authorized cable operators to use terrestrial programming as a product differentiator. Likewise, AT&T regards its provision of HD content as a worthwhile way to differentiate its video product offering.<sup>146/</sup> Because the Complaint fails to demonstrate that AT&T’s lack of access to the programming at issue results from an improper purpose, it should be dismissed.<sup>147/</sup>

**2. AT&T’s Ability to Provide Satellite Cable Programming Is Not Prevented or Significantly Hindered by Lack of Access to MSG HD and MSG+ HD.**

AT&T’s Section 628(b) claims also fails because the Complaint does not show that AT&T is prevented or significantly hindered from providing satellite cable programming.

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<sup>145/</sup> Bulow/Owen at 3.

<sup>146/</sup> Todd Spangler, *Q&A: AT&T’s York Scopes Out HD Plans, Content EVP Weighs In On U-Verse’s Enhanced Format Future*, MULTICHANNEL NEWS (Aug. 9, 2008) (quoting Dan York, AT&T’s Executive Vice President of Content: “We provide more HD linear channels than our cable competitors in almost every market.”).

<sup>147/</sup> Straining to cast aspersions on Defendants lawful attempt to differentiate its video offering, AT&T avers that Commission approval should have been obtained for “any exclusive arrangement between Cablevision and Madison Square Garden.” Complaint ¶ 76. Of course, the services at issue here are terrestrially-delivered and therefore any decision to limit their distribution does not require permission under the safe harbor procedures for satellite cable programming exclusivity. 47 C.F.R. § 76.1002(c)(2), (4)-(5). Paradoxically, AT&T argues two sentences later that “this is not a case about exclusive contracts at all,” Complaint ¶ 76, thereby begging the question of why Defendants would need to seek approval from the Commission.

Indeed, AT&T's lack of access to the terrestrially-delivered MSG HD and MSG+ HD does not prevent it from providing *any* satellite cable programming. Further, AT&T's license to carry the satellite-delivered MSG and MSG+ services has provided AT&T subscribers with access to every game exhibited on MSG HD and MSG+ HD. Thus, AT&T's attempt to characterize MSG HD and MSG+ HD as unique and nonreplicable is facially untenable,<sup>148/</sup> since most subscribers today view the games shown on those channels on the standard-definition, satellite-delivered MSG and MSG+ programming services that AT&T is licensed to distribute to its U-Verse subscribers.

AT&T subscribers also have access to the numerous professional games carried by the national and local broadcast and cable networks. Sports programming is available in Connecticut from a range of television outlets, including YES Network, SportsNet New York, MSG, MSG+, ESPN, ESPN2, TNT, TBS, Versus, NFL Network, NHL Network, Fox Soccer Channel, Fox College Sports, Horseracing TV, Golf Channel, GolTV, ABC, CBS, NBC, and Fox, among others. All of these outlets are carried by AT&T.

These circumstances hardly depict a crisis of access to sports programming in Connecticut for AT&T. To the contrary, notwithstanding the portrayal of its sports program offerings set forth in the Complaint, AT&T boasts to the public that "AT&T U-verse customers know that there's really only one way to watch TV, especially the big game."<sup>149/</sup> AT&T has long promoted its "robust sports lineup available in most U-verse TV packages" in addition to the "access to even more unique sports programming with The Sports Package. . . . [which] includes

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<sup>148/</sup> Complaint at ii; *id.* at ¶ 2; ¶ 61; ¶ 75.

<sup>149/</sup> Press Release, AT&T, AT&T U-verse TV Football Fans Score With Unique College Football Content, Fantasy Football App (Aug. 24, 2009).

more than 25 channels of college sports, regional sports, international soccer, outdoor recreation, horse racing and more.”<sup>150/</sup>

Not surprisingly in view of the foregoing, AT&T offers meager evidence to support its claim that lack of access to MSG HD and MSG+ HD causes competitive harm -- and the evidence it does present is unconvincing.

**a. Prior Commission Statements Regarding Withholding of “Must Have” Sports Programming Are Inapposite Here Because AT&T Is Not Deprived of Any Games Shown on MSG HD and MSG+ HD.**

The Complaint recycles prior incantations regarding the “must have” status of regional sports programming.<sup>151/</sup> But while assertions that an MVPD’s competitive survival hinges upon carriage of local RSNs are commonplace in program access complaints and proceedings, reliable empirical evidence supporting this view continues to be elusive or even non-existent.<sup>152/</sup> In reviewing the transfer of Adelphia’s cable systems to Comcast and Time Warner, a majority of Federal Trade Commissioners concluded that even if an RSN entered into an exclusive arrangement with a cable operator, such an arrangement would be problematic only if it would

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<sup>150/</sup> Press Release, AT&T, AT&T U-verse TV Scores Football Programming Touchdown, Football Fans Can Enjoy Access to Big Ten Network Starting Aug. 30 With U-verse TV (Aug. 27, 2007).

<sup>151/</sup> See Complaint ¶¶ 56-57.

<sup>152/</sup> Even the oft-cited examples of Philadelphia and San Diego, *see* Complaint ¶ 57, fail to demonstrate that access to regional sports is essential to competitive viability. For example, in Philadelphia, the market most often cited as evincing the problems associated with excluding terrestrial programming from the ambit of section 628, cable’s market share is lower than or comparable to that in several similar metropolitan markets where DBS providers have raised no issues regarding access to regional sports networks, including Boston, New York, Providence, Hartford, Pittsburgh, and Albany. *See* BROADCASTING & CABLE YEARBOOK C-14 (2009). While Philadelphia has only a single RSN, moreover, the MVPD subscribers in Connecticut have access to multiple RSNs owned by three different companies. There is nothing in any Commission Order that provides a basis for concluding that any adverse impact from RSN withholding in Philadelphia (assuming *arguendo* such a showing could be made) should be extrapolated to the Connecticut marketplace. In San Diego, DirecTV itself was unable to demonstrate that the lack of access to local sports programming in that market had a statistically significant effect on expected DBS penetration levels. *See Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation, Time Warner Cable Inc., Comcast Corporation.*, 21 FCC Red. 8203, ¶ 148 (“*Adelphia Transfer Order*”).

“create a likely risk of a substantial harm to competition, on balance making consumers worse off,” and that they did “not have facts that indicate such a loss of competition is likely.”<sup>153/</sup> The FTC’s determination is consistent with other recent instances in which one or more MVPDs – including EchoStar, DirecTV and Cablevision – have opted not to carry a local RSN but nonetheless have continued to function as viable competitors.<sup>154/</sup> In fact, EchoStar presently still chooses not to offer the YES network to potential customers in New York, New Jersey and Connecticut.

Even if an MVPD’s competitive survival did require access to so-called “must-have” RSN programming,<sup>155/</sup> AT&T could advance no such argument here. U-Verse TV subscribers have access to every professional game telecast on MSG HD and MSG+ HD, because each such game telecast on MSG HD and MSG+ HD was also telecast on the satellite-delivered MSG and MSG+ services carried by AT&T.<sup>156/</sup> The Commission has never held or even remotely

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<sup>153/</sup> Statement of Chairman Majoras, Commissioner Kovacic and Commissioner Rosch Concerning the Closing of the Investigation Into Transactions Involving Comcast, Time Warner Cable, and Adelphia Communications (Jan.31, 2006) at 2, *available at* [www.ftc.gov/os/closings/ftc/0510151twadelphiamajoraskovacic\\_rosch.pdf](http://www.ftc.gov/os/closings/ftc/0510151twadelphiamajoraskovacic_rosch.pdf). A Federal Trade Commission staff report, examining whether cable operators could use sports exclusivity to foreclose competition in local markets, specifically noted that “historical evidence from other markets where the RSN rights are held on an exclusive basis by a cable company show that the necessary level of switching [to cause foreclosure] could not be expected.” *Vertically Integrated Sports Programming: Are Cable Companies Excluding Competition*, Hearing before the Senate Committee on the Judiciary, December 7, 2006, Statement of Michael Salinger, Director, Bureau of Economics, Federal Trade Commission, at 5-6.

<sup>154/</sup> See *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition*, MB Docket No. 07-29, Comments of Cablevision Systems Corporation, at 24-27 (filed April 2, 2007) (“Cablevision 2007 Comments”).

<sup>155/</sup> The Commission itself has observed that the process of identifying and classifying so-called “must have” programming is “difficult.” *2002 Program Access Order* ¶ 69.

<sup>156/</sup> It should be noted that the reverse is not true – every professional game included in the satellite-delivered MSG and MSG+ services carried by AT&T is not also included in the terrestrially-delivered MSG HD and MSG+ HD services.

suggested that subscribers are deprived of “must have” sports programming where, as here, they have access to all local professional games exhibited in a market.

Thus, notwithstanding their scant empirical underpinnings, the Commission’s previous statements regarding “must-have” sports programming are not germane to the instant proceeding because they were predicated upon a complete deprivation of local professional sports programming, a circumstance not present here.<sup>157/</sup> AT&T subscribers have been able to watch every local professional game carried on MSG and MSG+, thereby belying AT&T’s claim that it is deprived of crucial sports programming and distinguishing its circumstance from RSN access issues in Philadelphia and San Diego. There is no evidence in the Complaint to support a conclusion that an MVPD’s inability to distribute an HD RSN where it does distribute the affiliated SD RSN adversely affects – let alone impairs – its competitive viability.

Information on ratings for MSG HD and MSG+ HD further suggests that they cannot be described as “must have” programming that would significantly impair any MVPD that did not have access. For a variety of reasons having nothing to do with quality, viewer ratings for MSG HD and MSG+ HD are, like most HD networks, currently far below most well-known SD networks, including but not limited to A&E, ABC, Bravo, CBS, CNN, ESPN, Food Network, Fox, HGTV, Lifetime, MSG, MSG+, NBC, SNY, TNT, USA, and YES.<sup>158/</sup> While these SD networks are all fine networks, all cannot be considered “must have” or indispensable to an MVPD’s competitive viability, and yet far more consumers watch these channels than MSG HD or MSG+ HD. The most that can be said (and AT&T has not even shown this) is that MSG HD

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<sup>157/</sup> See Bulow/Owen at 8 (“[M]ost viewers are choosing whether or not to watch a program based on its content, not on whether it is carried in HD. If that is so, then HD RSN content cannot be ‘must have’ even if the SD RSN carrying the same professional games is considered by some to be ‘must have.’”).

<sup>158/</sup> See Levine Declaration ¶ 14.



and MSG+ HD are an attractive feature to some subset of the Connecticut customer base.<sup>159/</sup> But the same can be said for virtually every single program service included in an MVPD's line-up; and it cannot be the case that lack of access to any single channel in a distributor's line-up that is attractive to a subset of viewers is potentially actionable under Section 628(b).<sup>160/</sup>

**b. Selected Statistics from CEA Survey Reports Do Not Demonstrate Evidence of Competitive Harm to AT&T.**

The array of statistics AT&T collects from two surveys conducted by the Consumer Electronics Association ("CEA") also do not support for AT&T's claim of competitive harm.<sup>161/</sup> The report that 45% of American households have an HDTV, coupled with survey evidence that 57% of HDTV owners are sports fans,<sup>162/</sup> actually means that the expected universe of sports fans that own HDTVs could be expected to be slightly less than 26% of the total population. Since the CEA survey counted as sports fans even those who rated themselves to be "somewhat" of a fan,<sup>163/</sup> and only 77% of HDTV owners in the survey reported that they receive *any* HD programming,<sup>164/</sup> the intensity of interest in HD sports programming actually identified by the survey is likely less than implied by even that 26% figure.

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<sup>159/</sup> See Bulow/Owen at 5.

<sup>160/</sup> See Bulow/Owen at 4 ("AT&T's strategic alternatives are not limited to those that would attract the same exact set of subscribers it would have if it offered MSG HD and MSG+ HD at the price it would then charge. . . . The issue . . . is whether MVPDs have available substitute bundles of programming and other service attributes and prices that would permit them to continue as effective competitors at sustainable scales of operation.").

<sup>161/</sup> Complaint ¶¶ 59-60.

<sup>162/</sup> Complaint ¶¶ 58-59.

<sup>163/</sup> Complaint, Exhibit 7, at 8 (excerpting Consumer Electronic Association, Second Annual Inside the Mind of the HD Sports Fan Study (Jan. 2007) ("CEA Survey")).

<sup>164/</sup> *Id.*

AT&T notes the survey's finding that HD sports fans "spend 37% more time watching television programming . . . than non fans."<sup>165/</sup> But the information elided from the quote by AT&T explains that the 37% figure includes watching both television programming and DVDs.<sup>166/</sup> In addition, the survey's detailed breakdown of the additional television watching by sports fans reveals that only slightly more than half of that additional 37% is attributable an increased level of sports watching.<sup>167/</sup> While, as AT&T describes, the survey said that "48% of HDTV owner sports fans report purchasing their set to watch a specific sporting event,"<sup>168/</sup> the Super Bowl, Daytona 500, NBA Finals, and college bowl games are listed by the survey as the "top HDTV sales drivers," not RSN programming.<sup>169/</sup> Of HDTV owner sports fans' top ten "favorite sporting events to watch in high-definition" as identified by the survey, not one is an event identified with an RSN.<sup>170/</sup>

AT&T also notes the survey's claim that 48% of non-HDTV owners expect to purchase an HDTV within two years, claiming this "mak[es] clear that the HD format of sports programming will only continue to increase in competitive significance."<sup>171/</sup> But the survey report actually says that the "next wave of HDTV buyer" is a "group of more mainstream buyer[s] [that] places more emphasis on a broader and more balanced mix of content."<sup>172/</sup> AT&T

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<sup>165/</sup> Complaint ¶ 59.

<sup>166/</sup> CEA Survey at 3, 10.

<sup>167/</sup> CEA Survey at 10.

<sup>168/</sup> Complaint ¶ 59.

<sup>169/</sup> CEA Survey at 9.

<sup>170/</sup> CEA Survey at 11. *See* Bulow/Owen at 6 ("The status quo does not prevent AT&T's customers from watching any of the leading sporting events listed in the study in HD, as all of those events are carried on other networks").

<sup>171/</sup> Complaint ¶ 59.

<sup>172/</sup> CEA Survey at 22.

also ignores evidence in the same survey that HD RSN programming may not be the critical competitive element it claims. The survey found that among HDTV owners, 47% said they did not even know whether their “local sports network” broadcasted in HD. Among the 40% that said they were aware of whether their “local sports network” broadcast in HD, 76% said they were “satisfied with the quantity of sports broadcast.”<sup>173/</sup> Thus, the survey actually suggests high levels of marketplace satisfaction with the availability of local sports in HD.

AT&T’s report that “45 percent of HDTV sports fans would consider switching to another source of HD sports if superior to their current package” is unsurprising and proves little.<sup>174/</sup> Provided only with the statement that a hypothetical alternative HD sports package is “superior” to their current package, with no information about price, specific content, or quality, it is only logical that some relatively large number of survey respondents would at least “consider” changing. There is no indication that survey respondents understood the word “superior” in the question to mean the other potential source of HD sports would provide access to games that they would not otherwise be able to view in SD, and consideration of “switching to another source of HD sports” does not take any measure of the number of survey respondents who would actually switch. The selective information AT&T draws from the CEA surveys does not represent evidence of competitive harm.

The CEA survey does, however, suggest that even without access to MSG HD and MSG+ HD, there would be plenty of opportunity to attract other business, on terms that would benefit consumers. The study shows that over half of sports fans and 9 in 10 non-fans cared more about watching movies and other television programming than sports in HD, meaning that

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<sup>173/</sup> CEA Survey at 13.

<sup>174/</sup> Complaint ¶ 60.

the combination of non-sports fans, sports fans excited about watching non-sports programming, and Connecticut sports fans who do not have a special interest in the teams shown on MSG and MSG+ presents AT&T with a significant base from which to attract customers even without availability of MSG HD and MSG+ HD.<sup>175/</sup>

**c. ATT's Data Regarding the Percentage of U-Verse Subscribers Opting for HD Service in Connecticut Does Not Evidence Harm from Lack of Access to MSG HD and MSG+ HD.**

AT&T asserts that “underperform[ing]” penetration for its HD product in Connecticut is attributable to the inability to offer MSG HD and MSG+ HD,<sup>176/</sup> allegedly demonstrating the “vital important[ce]” of those services to its competitive viability.<sup>177/</sup> As a threshold matter, statistics on the percentage of U-Verse’s subscribers opting for HD service in Connecticut do not offer any insight into whether lack of MSG HD and MSG+ HD has caused AT&T to lose any video subscribers.<sup>178/</sup> Indeed, AT&T’s video subscriber penetration rate in Connecticut may be higher, lower, or similar to that which it attains in other markets. The Complaint offers no indication one way or the other, and the HD subscribership figures only provide a data point regarding the service level preferences of consumers that have already decided to become U-Verse subscribers.

In fact, a quantitative analysis by Professors Bulow and Owen of the very HD subscriber numbers provided by AT&T itself suggests that both the overall U-Verse penetration rate among homes passed in Connecticut – as well as the HD penetration rate among those households – is

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<sup>175/</sup> Bulow/Owen at 4-5.

<sup>176/</sup> AT&T Joint Declaration ¶ 51.

<sup>177/</sup> Complaint ¶ 61; AT&T Joint Declaration ¶ 18.

<sup>178/</sup> See Bulow/Owen at 9.

actually *higher* in Connecticut for AT&T than the comparable national average figures.<sup>179/</sup> As Professors Bulow and Owen note, “this is hardly evidence that AT&T has been badly harmed in Connecticut and that it has been deprived of a ‘must have’ product.”<sup>180/</sup> To the contrary, “AT&T’s only quantitative measure of injury is . . . meaningless.”<sup>181/</sup>

AT&T’s assertion that the putatively lower penetration rate is due to lack of MSG HD and MSG+ HD is unsupported by anything but supposition.<sup>182/</sup> AT&T “provides no serious empirical analysis and makes no effort to quantify how much, if any,” of the purported impact on HD subscribership in Connecticut is due to the lack of MSG HD and MSG+ HD.<sup>183/</sup> Mere comparison of AT&T’s HD penetration rate in Connecticut with average HD penetration in other areas served by AT&T “does not actually test the effect of MSG HD and MSG+ HD exclusion.”<sup>184/</sup> A myriad of possible alternative explanations remain entirely unexplored, including pricing, quality of the service, non-sports program offerings, as well as other factors.<sup>185/</sup> The CEA survey report proffered by AT&T with its Complaint reports that data on adoption rates for HD services “suggests some HDTV owners do not want to pay an extra fee . . .

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<sup>179/</sup> See Bulow/Owen at 9-11.

<sup>180/</sup> *Id.* at 11.

<sup>181/</sup> *Id.* at 11.

<sup>182/</sup> AT&T’s claim that HD penetration rates in Connecticut should actually be higher than other areas because average incomes in Connecticut are higher is unsupported by any evidence that HD subscription rates are typically related to income levels, *see* AT&T Joint Declaration ¶ 18, and, as with other AT&T assertions about its HD penetration rate, fails to account for other possible causes of the lower HD penetration rate.

<sup>183/</sup> Bulow/Owen at 9.

<sup>184/</sup> *Id.*

<sup>185/</sup> See Bulow/Owen at 9 (“[M]any factors may affect HD penetration rates including, for example, pricing, characteristics of the service, marketing effort, demographics, and competitive alternatives (including the SD package that AT&T offers in the market).”).

to upgrade to a high-definition package.”<sup>186/</sup> This suggests that the fact that AT&T requires Connecticut subscribers to pay extra for HD services-- while Cablevision and Cox Cable do not -  
-,<sup>187/</sup> may be a significant contributing factor in explaining AT&T’s lower HD penetration rates.<sup>188/</sup>

Other possible reasons for lower HD penetration -- e.g., reasons related to HD service quality or capabilities -- remain similarly unexplored by AT&T. For example, the network footprint of the MSG and MSG+ services is not coterminous with either the entire State of Connecticut or all areas of the State served by U-Verse; the data provided by AT&T offer no indication of whether its HD subscribership is higher or lower in the parts of the State where MSG’s networks are not available. In addition, an on-line poll at an AT&T U-verse users forum reports that 47.5% of respondents consider AT&T’s HD quality to be either “not as good as” or “far worse” than their previous provider’s HD service, with another 3.5% expressing dissatisfaction with AT&T HD quality though they had no previous provider with which to compare.<sup>189/</sup> While not scientific, the poll clearly suggests that there may be real quality issues with AT&T HD service that may contribute to lower HD penetration rates. Similarly, some users report dissatisfaction with the reported inability of AT&T U-verse service to allow subscribers to receive HD programming on more than two televisions or DVRs at the same time.<sup>190/</sup> Alternative explanations such as these need to be fully

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<sup>186/</sup> CEA Survey at 9.

<sup>187/</sup> See, e.g., AT&T U-verse U-connect, HD Service, Only \$10 per Month, at <http://www.att.com/gen/sites/iptv?pid=12592> (last visited Sept. 9, 2009); Mike Robuck, *Cablevision deploys more than 100 free HD channels across footprint*, CEDMAGAZINE.COM, June 24, 2009 (quoting Cablevision Senior Vice President of Product management John Trierweiler as saying, “We launched HD in 2003 with a philosophy that high-definition programming should be available free to our digital cable customers, and more than 100 HD channels later we have held firm to that commitment.”); Cox HD Service at <http://www2.cox.com/residential/connecticut/tv/high-definition.cox> (last visited Sept. 10, 2009) (advertising “Over 150 FREE HD choices any time you watch”).

<sup>188/</sup> Bulow/Owen at 11 (“[O]ne of the reasons that AT&T may be doing relatively less well in selling HD to customers in Connecticut than it is doing in terms of overall customer acquisition is Cablevision’s aggressive strategy of offering over 60 HD channels free to subscribers, compared to AT&T’s requirement that consumers pay a minimum of \$10 more to receive HD. This pro-consumer action by Cablevision would be expected to increase its relative share of customers who upgrade to HD, relative to other markets where AT&T’s cable competition may not undertake such a pro-consumer strategy.”).

<sup>189/</sup> UverseUsers.com Forum, at [http://www.uverseusers.com/index.php?option=com\\_smf&Itemid=2&topic=2821.0](http://www.uverseusers.com/index.php?option=com_smf&Itemid=2&topic=2821.0) (last visited Sept. 4, 2009).

<sup>190/</sup> See, e.g., My3Cents.com, AT&T Cable Services Complaint - UVerse HD TV, at <http://www.my3cents.com/showReview.cgi?id=46203> (last visited Sept. 4, 2009).

explored before AT&T's attempt to blame its lower Connecticut HD penetration rate on lack of access to MSG HD and MSG+ HD can even be considered as a possible contributing factor.

In short, the meager statistics on HD penetration rates offered by AT&T are not sufficient to show the company has been harmed by lack of access to MSG HD and MSG+ HD.

**d. AT&T Continues to Robustly Compete in the Connecticut Video Market Without MSG HD and MSG+ HD**

AT&T paints itself as a struggling new market entrant with its claim that access to MSG HD and MSG+ HD is "vitally important to AT&T's ability to compete as a new entrant in the MVPD marketplace in Connecticut."<sup>191/</sup> But this misleading picture is contradicted by the facts.<sup>192/</sup> AT&T is the largest telecommunications company in the U.S., and the largest incumbent local exchange carrier ("ILEC") in Connecticut.<sup>193/</sup> AT&T provides vide service to "more than half of Connecticut" with the capability to serve "more than 370,000 households."<sup>194/</sup> One Connecticut newspaper states that AT&T continues to have "'aggressive' expansion plans" that portend "a full-scale war over Internet, phone and television service is on the horizon" in the

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<sup>191/</sup> Complaint ¶ 61.

<sup>192/</sup> See Bulow/Owen at 8 ("In principle, AT&T might have provided evidence that an MVPD that cannot offer an HD RSN such as MSG HD or MSG+ HD could not effectively compete. But AT&T offered no such evidence. In fact it has been a successful competitor, and one that provides a considerable amount of sports programming in HD.").

<sup>193/</sup> See AT&T, Corporate Profile, Key Facts, at <http://www.att.com/gen/investor-relations?pid=5711> (last visited Sept. 9, 2009) (reporting AT&T to be "the largest communications holding company in the world," the "leading U.S. provider of local and long distance voice services," and the "nation's largest provider of broadband"); Federal Communications Commission, Statistics of Common Carriers, 2005-2006 Edition, at 13, available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-282813A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-282813A1.pdf) (listing Southern New England Telephone Company d/b/a AT&T, Inc. as the largest telephone carrier service Connecticut).

<sup>194/</sup> *Now on Demand: Competition, AT&T is Poised to Fight a Full-Scale War with Cable Companies But Will the Prices Come Down?*, HARTFORD COURANT (May 24, 2009).

state.<sup>195/</sup> In April 2009, AT&T reported that as of the first quarter 2009, “about 60% of the customers signing up for AT&T’s U-verse services are switching from cable competitors.”<sup>196/</sup> AT&T currently offers at least 110 HD channels<sup>197/</sup> and touts that these HD offerings rival or beat incumbent cable companies’ offerings.<sup>198/</sup>

AT&T has differentiated itself from the cable operators that it competes with, including Cablevision, by highlighting new and innovative service offerings related to its wireless, broadband, and DVR services. For example, AT&T has been heavily promoting its “Total Home DVR” service as a differentiator from services offered by cable operators.<sup>199/</sup> AT&T also recently announced a new service available exclusively to U-verse TV customers that allows

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<sup>195/</sup> *Id.*; see also *AT&T Calls for Help, Hiring 100 People, 50 of them to Sell U-Verse TV Service Door to Door*, HARTFORD COURANT (Aug. 12, 2009) (reporting on AT&T’s hiring efforts for “door-to-door salespeople to sell its U-verse television service” and noting that “U-verse is also offered as a package, with voice, Internet and wireless services, and competes with cable television services offered by companies such as Comcast.”).

<sup>196/</sup> Todd Spangler, *AT&T: 60% Of U-verse Customers From Cable Competitors*, MULTICHANNEL NEWS (April 22, 2009).

<sup>197/</sup> Todd Spangler, *U-verse TV Hits 110 HD Channels*, MULTICHANNEL NEWS (July 20, 2009).

<sup>198/</sup> Todd Spangler, *U-verse Hits 100-Plus HDs Channels In All TV Markets, AT&T Claims That Tops Local Cable Providers In Those DMAs*, MULTICHANNEL NEWS (March 2, 2009) (reporting that AT&T claims that its 100-plus HD offerings “tops the HD channel lineups offered by the local cable providers in every U-verse TV market” and noting that “only a few cable operators have hit the [triple-digit HD] mark”); Press Release, AT&T, *AT&T U-verse TV Lineup Expands to 100 or More High Definition Channels in Every U-verse TV Market* (Mar. 2, 2009) (quoting AT&T Executive Vice President of Content and Programming Dan York as saying, “[Y]ou can’t beat the U-verse TV HD experience.”); Press Release, AT&T, *AT&T U-verse TV Adds ShortsHD and New International Channels* (July 20, 2009) (“U-verse TV customers enjoy access to an extensive HD channel lineup . . . exceeding the HD channel lineups offered by the local cable providers in every U-verse TV market.”); Press Release, AT&T, *AT&T U-verse TV Lineup Expands to Include Six New HD Channels from MTV Networks* (May 15, 2009) (quoting AT&T Executive Vice President Dan York as saying, “These HD additions help us . . . to continue to deliver more HD channels than the local cable providers.”).

<sup>199/</sup> Press Release, AT&T, *AT&T U-verse Introduces Total Home DVR, Taking ‘When You Want, Where You Want’ TV Viewing to Whole New Level* (Sept. 9, 2008) (“While some other providers may claim to offer some form of whole home DVR, AT&T U-verse Total Home DVR is the only one that truly lets you play back recorded programs from a single DVR on any connected TV in the house”).



them to program their home DVR remotely using an iPhone or iPod Touch device.<sup>200/</sup> AT&T calls this “a feature exclusive to AT&T among multi-room DVRs,” proclaiming that “[w]ith AT&T U-verse, you’re getting DVR capabilities you can’t find from any cable providers.”<sup>201/</sup> AT&T also is marketing service bundles that include the company’s wireless services as a means to differentiate AT&T services from those of cable operators.<sup>202/</sup> It recently announced a “Buy Two, Get One Free” promotion -- “a flexible AT&T U-verse triple-play bundle that includes wireless voice service, a bundle option that is not available from the local cable providers.”<sup>203/</sup>

AT&T also is attempting to differentiate itself by emphasizing sports programming channels that Cablevision does not carry, such as the new NFL RedZone channel provided as a part of the U-Verse HD line-up.<sup>204/</sup> In highlighting this new offering, AT&T noted that NFL RedZone is an offshoot of the NFL Network, which is also available on U-Verse.<sup>205/</sup> As noted

<sup>200/</sup> Press Release, AT&T, New iPhone and iPod Touch Application from AT&T Lets Customers Schedule U-verse TV DVR Recordings on the Go (June 25, 2009) (“With AT&T U-verse, you get DVR capabilities you can’t find from any other provider, and this app gives users the freedom to schedule their DVR from their iPhone or iPod touch.”).

<sup>201/</sup> Press Release, AT&T, AT&T Rolls Out More U-verse Enhancements at No Additional Cost to Customers (June 16, 2009).

<sup>202/</sup> Todd Spangler, *AT&T Plugs Wireless As Part Of U-Verse TV Bundle, Telco Also Debuts College Football VOD Section*, MULTICHANNEL NEWS (Aug. 24, 2009). See also *Now on Demand: Competition, AT&T is Poised to Fight a Full-Scale War with Cable Companies But Will the Prices Come Down?*, HARTFORD COURANT (May 24, 2009) (reporting that AT&T has a billboard advertisement in Bridgeport, part of the NY DMA, stating that “Only AT&T bundles voice, video, Internet and wireless. Cable doesn’t.”).

<sup>203/</sup> Press Release, AT&T, AT&T Introduces New “Buy Two Get One Free” U-verse TV and Wireless Bundle (Aug. 24, 2009) (“With the choice to bundle wireless voice, this is an offer that cable can’t match.”). While the initial announcement did not list Connecticut as an area in which the offer would be immediately available, AT&T said that the offer “will be made available to all AT&T U-verse markets in the coming weeks.” *Id.*

<sup>204/</sup> Mike Reynolds, *Updated: AT&T, RCN Add NFL RedZone To Lineup, Telco Positions Service On HD Premium Tier*, MULTICHANNEL NEWS (Sept. 11, 2009) (“U-verse TV football fans will truly enjoy tuning to NFL RedZone to watch the touchdowns and the biggest plays as they happen on their big screen TV”).

<sup>205/</sup> See *id.*

above, neither the NFL Network nor NFL RedZone are carried by Cablevision. In addition, AT&T has sought to attract sports fans by promoting interactive television features that focus on sports-related content,<sup>206/</sup> noting that its “customers who use the interactive features of its AT&T U-Verse IPTV service are less likely to churn.”<sup>207/</sup>

Even if AT&T could claim that the programming content on MSG HD and MSG+ HD is nonreplicable – which is not the case here since all the professional games shown by those services are available on channels provided to U-Verse subscribers – that does not mean that the unavailability of such programming content to AT&T causes it competitive harm. All copyrighted programming content is unique, but the inability to license particular content does not, as Professors Bulow and Owen explain, exhaust a video distributor’s competitive options.<sup>208/</sup> The most recent Commission report on competition in the video marketplace found that there are 565 programming networks, over 85% of which are not owned by or affiliated with any cable operator.<sup>209/</sup> Thus, even if MSG HD and MSG+ HD could be considered nonreplicable, there is nothing to prevent AT&T from responding to Defendants differentiation strategy by entering into

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<sup>206/</sup> Todd Spangler, *AT&T Plugs Wireless As Part Of U-Verse TV Bundle, Telco Also Debuts College Football VOD Section*, MULTICHANNEL NEWS (Aug. 24, 2009) (reporting on the availability of College Football Extras, a VOD option which will feature content from several college football programs, including all Big Ten Conference teams); Press Release, AT&T U-verse TV Gears Up For Football Season with Yahoo! Sports Fantasy Football on AT&T U-bar, U-verse TV Customers Can Track Fantasy Teams, NFL Stats and Leaders With Latest U-bar Enhancements (Aug. 7, 2008) (announcing the launch of Yahoo!® Sports Fantasy Football on AT&T U-verse<sup>SM</sup> TV which allows sports fans to use the interactive AT&T U-bar “to simply and conveniently track their fantasy football team and receive customized information on their favorite NFL teams directly on their U-verse TV.”).

<sup>207/</sup> *AT&T: Interactive TV Aiding Customer Retention*, Telephony Online (Mar. 20, 2009) (reporting that Yahoo Sports college basketball was the latest interactive programming on AT&T’s U-verse IPTV service).

<sup>208/</sup> Bulow/Owen at 4.

<sup>209/</sup> *2009 Video Competition Report* ¶ 184.

an exclusive arrangement with any one of hundreds of other programming services available on the market that are not subject to the program access rules.

This is precisely the effect typically engendered by exclusivity strategies in the media and communications business, and that is why exclusivity is regarded as beneficial to consumer welfare.<sup>210/</sup> Indeed, Verizon (through its development of FiOS1), DirecTV (via its NFL Sunday Ticket package and other exclusive content such as “Friday Night Lights”), and Dish Network (through exclusive arrangements to distribute numerous foreign language programming services) are all investing in proprietary content to differentiate themselves in the marketplace.<sup>211/</sup> There is no reason why AT&T cannot do the same. To the extent that AT&T prefers to refrain from entering into exclusive arrangements or investing in its own programming content, it could pursue other differentiation strategies, including reducing its costs or bundling its video services with other unique communications services it offers to consumers.<sup>212/</sup>

Notwithstanding AT&T’s lack of MSG HD and MSG+ HD, it is still investing and deploying U-Verse TV in Connecticut, competing vigorously there and even claiming superiority over cable companies that don’t provide similar services. There is no evidence that MSG HD and

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<sup>210/</sup> See Bulow/Owen at 16-18.

<sup>211/</sup> Press Release, Verizon, Verizon Launches FiOS One Channels on Long Island and in Northern New Jersey (June 22, 2009)(noting that the service will feature news, sports, weather and local information, and entertainment programming that “won’t be found on cable TV”); DirecTV, NFL Sunday Ticket, at <https://www.directv.com:443/DTVAPP/content/sports/nfl> (last visited Sept. 15, 2009) (“If you’re a football fan, you need NFL SUNDAY TICKET — available only on DIRECTV.”); Friday Night Lights, <http://www.directv.com/DTVAPP/global/article.jsp?assetId=P5770265> (last visited Sept. 15, 2009) (“All 26 episodes of the fourth and fifth seasons of the critically acclaimed and award-winning drama series will air first exclusively on The 101 Network, only on DIRECTV”); Press Release, Dish Network, DISH Network Launches DishMEXICO Programming Package (Nov. 19, 2008) (announcing a new programming package “designed specifically for Mexicans” that includes programming “available exclusively on DISH Network”); Press Release, Dish Network, DISH Network Becomes Exclusive U.S. Provider of TeleAmazonas (Oct. 1, 2008) (announcing the launch of “a 24-hour Ecuadorian TV network” and saying that Dish Network is “the only pay-TV provider to offer the channel in the U.S.”).

<sup>212/</sup> Bulow/Owen at 4.

MSG+ HD are of such overwhelming importance that large numbers of AT&T subscribers are switching to (or refusing to switch from) Cablevision due to the fact that they can only watch local games in SD rather than HD, thereby significantly hindering AT&T's ability to compete in offering satellite cable programming.<sup>213/</sup> Count I should be dismissed because AT&T has not presented convincing evidence that its ability to compete in offering satellite cable programming in Connecticut is significantly hindered by lack of access to MSG HD and MSG+ HD.

**D. Neither Antitrust Law nor Economics Support AT&T's Claims**

AT&T's contention that Defendants' licensing strategy for MSG HD and MSG+ HD "qualifies" as "anticompetitive conduct" under "established standards"<sup>214/</sup> misapprehends applicable antitrust legal and economic principles, which point decisively against the forced sharing AT&T seeks.

AT&T concedes, as it must, that businesses ordinarily can select the distributors for their products and that imposing duties to deal is exceptional.<sup>215/</sup> As the very treatise AT&T cites explains, forcing access is "exceptionally drastic"<sup>216/</sup> because, among other reasons, compelling firms to share their legitimate competitive advantages with others undermines incentives to invest.<sup>217/</sup> This concern is heightened when, as here, rivals seek access to their competitors'

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<sup>213/</sup> See Bulow/Owen at 7 ("It is certainly true that Cablevision hopes to gain a marketing advantage amongst a group of avid local sports fans who will regard the availability of MSG HD and MSG+ HD as a selling point in Cablevision's favor relative to AT&T. But just as the value to Cablevision is incremental, any 'harm' to AT&T is also at the margin and there is no evidence of any impairment of AT&T's competitive viability.").

<sup>214/</sup> Complaint ¶ 70.

<sup>215/</sup> Complaint ¶ 69.

<sup>216/</sup> 3B PHILLIP E. AREEDA AND HERBERT HOVENKAMP, ANTITRUST LAW ¶ 773b3, at 246 (3d ed. 2008).

<sup>217/</sup> *Id.* ¶ 773e, at 257; Bulow/Owen at 21-22.

intellectual property.<sup>218/</sup> Thus, the U.S. antitrust enforcement “[a]gencies will not require the owner of intellectual property to create competition in its own technology.”<sup>219/</sup> And the courts likewise recognize that the presumptive right under the antitrust laws to refuse to license copyright works “creates a system of incentives that promotes consumer welfare in the long term by encouraging investment.”<sup>220/</sup> Contrary to what AT&T contends, neither Defendants’ “selective refusal to deal” nor the impact of Defendants’ licensing strategy on AT&T overturn these principles and support imposing a duty to deal here.

*First*, Defendants’ decision to license MSG HD and MSG+ HD to some, but not all, MVPD distributors is procompetitive – not, as AT&T would have it, some tell-tale sign of anticompetitive exclusion. It is commonplace and output-expanding for firms selectively to license intellectual property.<sup>221/</sup> By contrast, AT&T’s suggestion that licensors (such as Defendants) are under an obligation to license *all* or *none* would harm consumers by reducing the incentive for an intellectual property holder to license anyone.<sup>222/</sup> Defendants’ decision to license MSG HD and MSG+ HD to a range of firms – some of which it does not compete with, such as Comcast and Time Warner Cable, and some of which it does compete with, such as RCN and DirecTV – but not others, thus is on its face output expanding and benefits consumers.

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<sup>218/</sup> There can be no dispute that MSG HD and MSG+ HD programming is protected under the copyright laws; AT&T concedes that it needs a license in order to distribute such programming.

<sup>219/</sup> U.S. Dep’t of Justice and Federal Trade Commission, Antitrust Guidelines for the Licensing of Intellectual Property (“IP Guidelines”) § 3.1, at 7 (Apr. 6, 1995).

<sup>220/</sup> *In re ISO Antitrust Litig.*, 203 F.3d 1322, 1328-29 (Fed. Cir. 2000) (quoting *Data Gen. Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1186-87 (1st Cir. 1994)).

<sup>221/</sup> Bulow/Owen at 16.

<sup>222/</sup> See IP Guidelines, *supra*, § 2.3, at 5 (explaining that “benefits” of license restrictions include “increase[ing] the licensor’s incentives to license, for example, by protecting the licensor from competition in the licensor’s own technology in a market niche that it prefers to keep for itself”).

Moreover, the decision not to license Cablevision's closest competitors, one of which is AT&T, is amply supported by an even more particularized efficiency justification: product differentiation. As explained elsewhere herein,<sup>223/</sup> product differentiation is an important, procompetitive aspect of competition among video distributors; it is not, as AT&T claims,<sup>224/</sup> a mere euphemism for impeding rivals. Although Cablevision can differentiate itself against some providers (such as DirectTV and RCN) through a variety of means, the ability to differentiate against AT&T and Verizon, which provide services similar to Cablevision's, is more restricted and accordingly programming-based differentiation is relatively more important.<sup>225/</sup> In this context, MSG HD and MSG+ HD comprise attributes by which Cablevision differentiates its video product offering from AT&T's; and AT&T, in turn, has sought in a variety of ways to differentiate its service from Cablevision's.<sup>226/</sup> Cablevision's election to employ an organically-created competitive advantage (MSG HD and MSG+ HD) as a differentiator against its closest competitors is thus a legitimate business justification that precludes deeming Cablevision's conduct anticompetitive.

The presence of a legitimate business justification for Defendants' licensing strategy undermines AT&T's contention,<sup>227/</sup> that Cablevision is engaging in an anticompetitive "profit sacrifice." AT&T makes no effort to quantify the purported revenues that Defendants have sacrificed; and it wrongly assumes Cablevision can claim no legitimate product differentiation

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<sup>223/</sup> See *supra* Section III.C.1; Bulow/Owen at 14-21.

<sup>224/</sup> Complaint ¶ 67.

<sup>225/</sup> See Bulow Owen at 4-5.

<sup>226/</sup> See *supra* Section III.C.1.

<sup>227/</sup> Complaint ¶ 70.

benefit from “foregoing” licensing revenues and using MSG-HD and MSG+ HD as a product differentiator.<sup>228/</sup>

Compelling Cablevision to share MSG HD or MSG+ HD with AT&T is supported by none of the authorities AT&T cites.<sup>229/</sup> The circumstances here bear no resemblance to *Lorain Journal Co. v. United States*,<sup>230/</sup> where a monopolist newspaper put advertisers to an “all or nothing” choice that effectively compelled those customers not to deal with the newspaper’s rival. Cablevision’s conduct also differs markedly from *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*,<sup>231/</sup> where the defendant *terminated* a prior course of dealings with its rivals. Here, as AT&T itself stresses, Cablevision never has licensed MSG HD or MSG+ HD to AT&T. Nor does the Supreme Court’s rejection of a refusal-to-deal claim in *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*,<sup>232/</sup> somehow support AT&T’s cause. On the contrary, “*Trinko* now effectively makes the unilateral termination of a voluntary course of dealing” – a circumstance absent here – “a requirement for a valid refusal-to-deal claim.”<sup>233/</sup>

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<sup>228/</sup> Put differently, AT&T offers no facts that suggest that licensing strategy fails to increase Cablevision’s enterprise-wide *short-term* profits relative to the strategy AT&T wishes Defendants would pursue. See *Christy Sports, LLC v. Deer Valley Resort Co.*, 555 F.3d 1188, 1197 (10th Cir. 2009) (rejecting monopolization claim when no evidence of termination of profitable business arrangement); Bulow/Owen at 11-12. Even if AT&T demonstrated that Cablevision wrongly believes that the product differentiation benefits of Defendants’ licensing strategy outweigh foregone revenues, AT&T is wrong, Complaint ¶ 72, that such a mistaken belief would support finding an anticompetitive refusal to deal. See, e.g., 3B AREEDA, *supra*, ¶ 772d3, at 223-227 (explaining that a profit sacrifice is a necessary but not sufficient condition for judging a refusal to deal anticompetitive following *Trinko*).

<sup>229/</sup> Complaint ¶¶ 69-71.

<sup>230/</sup> 342 U.S. 143 (1951).

<sup>231/</sup> 472 U.S. 585 (1985).

<sup>232/</sup> 540 U.S. 398 (2004).

<sup>233/</sup> *Covad Communications Co. v. BellSouth Corp.*, 374 F.3d 1044, 1049 (11th Cir. 2004).

Defendants' licensing of MSG HD and MSG+ HD also does not run afoul of *Otter Tail Power Co. v. United States*,<sup>234/</sup> the case upon which AT&T places the most weight. Like *Aspen*, but unlike the instant matter, *Otter Tail* involved terminating a prior course of dealings; moreover, *Otter Tail* involved a monopolist which generally offered various services to all but cut-off customers which elected to compete against it in downstream markets.<sup>235/</sup> Defendants' policy of not licensing MSG HD or MSG+ HD to its closest competitors, including AT&T, does not fit that paradigm. Additionally, the absence of a profit sacrifice provides an independent reason that Defendants' licensing decisions do not fit the limited duties to deal recognized by *Aspen* and *Otter Tail*.

*Second*, even if Defendants' licensing strategy resembled the conduct condemned in other circumstances (which it does not), AT&T comes nowhere near to showing the type of anticompetitive impact that would support imposing a duty to deal under standard antitrust analysis. AT&T argues lack of access to MSG HD and MSG+ HD costs it subscribers. But the mere fact that AT&T could do better with this particular HD programming does not support imposing a duty to deal.<sup>236/</sup> On the contrary, as the very treatise AT&T cites explains, antitrust principles do not support imposing a duty to deal unless, among other things, neither the rival nor

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<sup>234/</sup> 410 U.S. 366 (1973).

<sup>235/</sup> See *id.* at 368-71.

<sup>236/</sup> See *Twin Labs., Inc. v. Weider Health & Fitness*, 900 F.2d 566, 569 (2d Cir. 1990) (rejecting plaintiff's refusal-to-deal claim because even if "growth would have been even more rapid but for" the defendant's conduct, "this hardly constitutes a showing of severe handicap" that might warrant imposing a duty to deal).



competition would exist without compelling access.<sup>237/</sup> Professors Bulow and Owen, in their analysis of AT&T's allegations, make the same point.<sup>238/</sup>

Here, AT&T cannot credibly make the argument that its competitive vitality – let alone the competitive vitality of the video marketplace in southwestern Connecticut – depends upon access to MSG HD and MSG+ HD, networks without which it launched U-Verse and without which it continues to gain in subscribers. Whether or not AT&T could recreate MSG HD and MSG+ HD's programming is beside the point,<sup>239/</sup> as AT&T plainly can effectively compete with other programming, including SD programming that features the very same professional sporting events that AT&T receives as part of its license for the satellite-delivered, standard definition MSG and MSG+ services.<sup>240/</sup>

For this reason, AT&T's claim that Defendants' licensing strategy nefariously raises entry barrier by requiring AT&T to engage in "two level entry" is a red herring.<sup>241/</sup> For one thing,

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<sup>237/</sup> See 3B AREEDA, *supra*, ¶ 773b, at 240. See also *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 544 (9th Cir. 1991) (no essential facilities claim unless withholding input confers "power to eliminate competition in the downstream market") (emphasis in original).

<sup>238/</sup> Bulow/Owen at 3 (prerequisites for deeming refusal to deal anticompetitive include (i) that input is essential to competition and (ii) monopoly power). AT&T is thus wrong that inability to duplicate the *particular input* to which it seek access both supports imposing a refusal to deal and obviate concerns that forced sharing undermines investment incentives. Complaint ¶ 75. Indeed, the Areeda treatise AT&T cites specifically states the contrary. See 3B AREEDA, *supra*, ¶ 773b, at 240-41; ¶ 773e, at 257-58. The treatise thus in no way supports AT&T's baseless contention that when "no competitors have the capability to duplicate a denied input, the theory that exclusivity will spur investment or that so-called forced sharing will retard incentives to invest is unfounded." Complaint ¶ 75. On the contrary, the treatise states that "the loss of competitor incentives" could "be extremely serious to the point of undermining antitrust goals in the case where [rivals] could enter the market by some alternative not requiring the sharing of the defendant's facility." 3B AREEDA, *supra*, ¶ 773b, at 196. Because AT&T can effectively compete without MSG HD and MSG+ HD, that is precisely the case here. See Bulow/Owen at 14.

<sup>239/</sup> See Complaint ¶ 73.

<sup>240/</sup> See 3B AREEDA, *supra*, ¶ 773b1, at 240-41 ("The plaintiff must show that the desired resource is not just helpful but vital to its competitive viability.").

<sup>241/</sup> Complaint ¶ 73.

AT&T *has* successfully entered against Cablevision in providing video services despite the lack of access to MSG HD and MSG+ HD.<sup>242/</sup> For another, the authorities AT&T cites<sup>243/</sup> involve the very different problem of conduct that, by anticompetitively creating a second-level monopoly, undesirably reinforces monopoly power at the first level.<sup>244/</sup> Here, AT&T does not and cannot make any claim that Cablevision is attempting to impede AT&T in order to protect MSG HD and MSG+ HD from entry threats by new programming.<sup>245/</sup> Finally, and most importantly, not all conduct that in some sense makes it harder on rivals is anticompetitive; on the contrary, permitting firms to keep the fruits of their legitimate competitive advantages to themselves is procompetitive,<sup>246/</sup> and that is true of Defendants' licensing strategy here.<sup>247/</sup>

#### IV. DEFENDANTS' REFUSAL TO LICENSE MSG HD AND MSG+ HD TO AT&T DOES NOT VIOLATE SECTION 628(c)

AT&T argues in Count II of its Complaint that Defendants are "unreasonably refusing to sell video programming to AT&T."<sup>248/</sup> While the Commission has held that unreasonable refusals to sell could constitute a form of non-price discrimination that would be actionable under Section 628(c),<sup>249/</sup> only satellite cable programming is subject to this prohibition.<sup>250/</sup> Since

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<sup>242/</sup> See Bulow/Owen at 3.

<sup>243/</sup> Complaint ¶ 73, n.52.

<sup>244/</sup> See, e.g., *Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 23-24 (1st Cir. 1990) (describing how "a monopolist who *extends* his monopoly to a second level" can "rais[e] 'entry barriers'" in the first).

<sup>245/</sup> Any such contention, moreover, would contradict the D.C. Circuit's recent conclusion that "Cable operators . . . no longer have . . . bottleneck power over programming." *Comcast Corp. v. FCC*, No. 08-1114, Slip Op. at 14 (D.C. Cir. Aug. 28, 2009).

<sup>246/</sup> See 3B AREEDA, *supra*, ¶ 773e, at 257.

<sup>247/</sup> Bulow/Owen at 15 ("[T]here is no evidence in this case that Cablevision/MSG's decision to limit distribution has harmed multichannel video competition."); *supra* Part II.C.1.

<sup>248/</sup> Complaint ¶ 94.

<sup>249/</sup> See *Program Access First Report and Order* ¶ 116; *AT&T/CoxCom Order* ¶ 4.

MSG HD and MSG+ HD are not “satellite cable programming,” AT&T’s inability to obtain a license for that programming is not subject to challenge as an “unreasonable refusal to sell.”

Undoubtedly aware of the limited scope of Section 628(c), AT&T baldly asserts that MSG HD and MSG+ HD are actually “‘satellite cable programming’ because the underlying programming is delivered via satellite.”<sup>251/</sup> AT&T makes no effort to support its remarkable claim with any evidence to suggest that MSG HD and MSG+ HD are “transmitted via satellite . . . for [] direct receipt by cable operators,”<sup>252/</sup> even admitting elsewhere in the Complaint that Defendants undertake “delivery of the HD format of MSG and MSG Plus through terrestrial means.”<sup>253/</sup> Indeed, the Complaint does not even cite – let alone explicate how MSG HD and MSG+ HD satisfy – the statutory definition of “satellite cable programming,”<sup>254/</sup> which is a jurisdictional prerequisite to the exercise of authority under Section 628(c). This omission, by itself, is fatal to Count II.<sup>255/</sup>

AT&T asks the Commission to determine that because MSG and MSG+ programming are delivered by satellite, MSG HD and MSG+ HD should be considered satellite delivered for purpose of the Commission’s program access rules because the MSG HD and MSG+ HD are merely “technical formats of the ‘programming,’ . . . which Defendants have chosen to deliver

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<sup>250/</sup> See, e.g., *DirecTV Order* ¶ 14 (noting complainant allegation of Section 628(c) violation for refusal to license Comcast SportsNet); *id.* at ¶¶ 24-25 (rejecting Section 628(c) claims); *Comcast SportsNet Order on Review* ¶ 12 (holding that a terrestrially-delivered service is “outside of the direct coverage of Section 628(c)”).

<sup>251/</sup> Complaint ¶¶ 93, 96.

<sup>252/</sup> 47 U.S.C. § 605(d)(1).

<sup>253/</sup> Complaint ¶ 101.

<sup>254/</sup> *Id.*

<sup>255/</sup> See *RCN Order* ¶ 22, n.75 (refusing to consider complainant’s claim that programming at issue is satellite-delivered because it “did not plead sufficient facts to support this argument”).

terrestrially.”<sup>256/</sup> AT&T offers no support for this proposition – no doubt because there is none.

In fact, the FCC already has rejected such an argument:

We believe that the correct reading of Section 628(c) is that the provisions in question apply to satellite cable programming, not programming that was “previously” satellite-delivered, or the “equivalent” of satellite cable programming, or *programming that would qualify as satellite cable programming, but for its terrestrial delivery*. The statute defines “satellite cable programming” as that which is transmitted via satellite.<sup>257/</sup>

Other Commission decisions likewise reject the notion that programming which may partake of some elements or qualities of “satellite cable programming” therefore qualifies as such for purposes of Section 628.<sup>258/</sup> Instead, in ascertaining whether programming is subject to the strictures of Section 628, the Commission has consistently adhered to the plain language of Section 628 and focused on the means by which that particular programming is transmitted to cable operators and other MVPDs.<sup>259/</sup>

Whether a programmer uses satellite delivery for SD or analog programming content offers no basis for imposing program access on the provisioning of an affiliated HD program service via terrestrial means. Subjecting a terrestrial HD service to program access requirements simply because an affiliated SD programming service was satellite-delivered would be

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<sup>256/</sup> Complaint ¶ 96.

<sup>257/</sup> *EchoStar Order* ¶ 21 (emphasis added). *See also RCN Order* ¶ 26.

<sup>258/</sup> *See Everest Midwest Order* ¶ 7, n.34 (“The Commission has previously found that terrestrially-delivered services are not providing satellite cable programming even though some of the content thereof is received by satellite.”); *DirectTV Order* ¶ 25; *EchoStar Order* ¶ 21.

<sup>259/</sup> *See Everest Midwest Order* ¶ 7 (“It is well settled that it is the vendor’s distribution method . . . that determines whether programming is subject to program access jurisdiction.”). AT&T’s argues that the terrestrially-delivered HD programming should be considered to be satellite delivered if the SD version of the programming is delivered by satellite because doing so would promote policy goals of competition and broadband deployment. Complaint at 38-39. Even if AT&T is correct that such a convoluted definition would promote those policy goals -- propositions for which it offers no evidence -- it would be arbitrary and capricious for the Commission to declare terrestrial programming to be delivered by satellite -- which it clearly is not -- simply to promote certain policy goals.

tantamount to a determination that a programmer covered by section 628 has an affirmative and continuing legal duty to distribute its programming in a manner that ensures its continuing coverage under the program access rules. But the Commission already has determined that Congress did not require that program access obligations could attach to a programming service that launches as -- or becomes -- terrestrially delivered.<sup>260/</sup>

Contrary to AT&T's suggestion,<sup>261/</sup> the Commission's rules do not reflexively consider networks transmitted in multiple formats to be the same programming. To the contrary, the Commission previously has classified HD programming services distinctly from its SD or analog counterpart.<sup>262/</sup> Indeed, the Commission's broadcast carriage rules expressly treated analog and digital versions of broadcast stations as separate and distinct services.<sup>263/</sup>

AT&T's argument that MSG HD and MSG+ HD differ from MSG and MSG+ only as a matter of technical format is also wrong as a factual matter.<sup>264/</sup> The programming on MSG HD and MSG+ HD is not the same as the satellite-delivered service. Not only is the resolution, depth, audio and display of the programming materially different (which is presumably why AT&T has filed the instant complaint), but the content also can differ as well.<sup>265/</sup> The satellite-delivered MSG and MSG+ services are separately licensed from the terrestrially-delivered MSG

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<sup>260/</sup> EchoStar Order ¶ 29.

<sup>261/</sup> See Complaint at ¶ 97, n. 55.

<sup>262/</sup> See also, e.g., 2009 Video Competition Report, Table 12 (treating as separate programming networks SD and HD versions of the same network -- e.g., A&E and A&E HD; ESPN and ESPN HD; Encore and Encore HD; HGTV and HGTV HD); *id.* at Table C-2 (same).

<sup>263/</sup> *Carriage of Digital Television Broadcast Signals, Amendments to Part 76 of the Commission's Rules*, 16 FCC Rcd 2598, ¶ 27 (2001) ("With regard to those stations that simultaneously broadcast analog and digital television signals, we conclude that a broadcaster is permitted to treat the two differently for carriage purposes. That is, a television station may choose must carry or retransmission consent for its analog signal and retransmission consent for its digital signal").

<sup>264/</sup> Complaint ¶ 96.

<sup>265/</sup> Levine Declaration ¶ 13.

HD and MSG+ HD services.<sup>266/</sup> Indeed, AT&T's own conduct in requesting access to MSG HD and MSG+ HD – when it already carries the satellite-delivered MSG and MSG+ services – itself demonstrates that the HD and SD services are not the same programming. Indeed, AT&T itself separately denotes SD and HD services in its channel lineup, separately listing, for instance, ESPN and ESPN HD and CNN and CNN HD.<sup>267/</sup> AT&T also charges subscribers an additional fee for access to the HD services it offers U-verse TV subscribers in Connecticut.<sup>268/</sup>

AT&T's argument also proves too much. If it is the case that the MSG HD and MSG+ HD programming is the same as the satellite-delivered MSG and MSG+ SD services, then AT&T is not being deprived of anything since it already has access to the SD programming.

AT&T also asserts that the Commission should eschew the actual statutory definition of satellite cable programming and deem MSG HD and MSG+ HD to be satellite-delivered because doing so would “best advance[] the purposes of the rules” and “advance the broader goals of the Communications Act.”<sup>269/</sup> But this ignores the Commission's repeated recognition that Congress specifically and deliberately excluded terrestrially-delivered cable programming from restrictions on exclusivity when it adopted the enabling statute.<sup>270/</sup> Expanding the program access requirements beyond the limits expressly imposed by Congress will not advance “the purposes of the rules” and “the broader goals of the Communications Act;” it will contravene them, by expanding the scope of these rules beyond the express limitations established by Congress.

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<sup>266/</sup> Levine Declaration ¶ 13.

<sup>267/</sup> See AT&T U-Verse channel lineup for Bridgeport, CT (attached as Exhibit 6).

<sup>268/</sup> See AT&T U-verse U-connect, HD Service, Only \$10 per Month, at <http://www.att.com/gen/sites/iptv?pid=12592> (last visited Sept. 9, 2009).

<sup>269/</sup> Complaint ¶¶ 97-98.

<sup>270/</sup> See *supra* at 27-29.

Similarly overreaching is AT&T's view that ignoring the actual means by which MSG HD and MSG+ HD are transmitted and characterizing those services as satellite-delivered is necessary to encourage the deployment of broadband services.<sup>271/</sup> Even disregarding the erroneous implication that the general prescriptions of Section 706 should trump Congress' specific limitation of Section 628 to satellite cable programming,<sup>272/</sup> the facts on the ground in Connecticut suggest that lack of access to MSG HD and MSG+ HD is not acting as a barrier to AT&T's investment in broadband in Connecticut. AT&T has invested hundreds of millions of dollars in expanding broadband infrastructure in Connecticut, notwithstanding its lack of guaranteed access to terrestrially-delivered sports programming.<sup>273/</sup> The Complaint offers no evidence at all that lack of access to MSG HD and MSG+ HD has in any way stifled or slowed broadband investment by AT&T.<sup>274/</sup>

AT&T offers no sound basis to conclude that Defendants have unreasonably refused to sell satellite cable programming, and Count II of the Complaint must therefore be rejected.

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<sup>271/</sup> Complaint ¶ 98.

<sup>272/</sup> See, e.g., *HCSC-Laundry v. United States*, 450 U.S. 1, 6 (1981) (applying the "basic principle of statutory construction that a specific statute . . . controls over a general provision"); *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 228-229 (1957) ("[T]he law is settled that 'However inclusive may be the general language of a statute, it 'will not be held to apply to a matter specifically dealt with in another part of the same enactment. . . . Specific terms prevail over the general in the same or another statute which otherwise might be controlling.'" (quoting *Ginsberg & Sons v. Popkin*, 285 U.S. 204, 208 (1932))); *Townsend v. Little*, 109 U.S. 504, 512 (1883) ("[I]t is familiar law that a specific statute controls over a general one 'without regard to priority of enactment.'").

<sup>273/</sup> Press Release, AT&T, Progressive Telecom Policies Spark Landmark AT&T Investment; \$336 million in New Technology Coming to Connecticut (June 26, 2006).

<sup>274/</sup> See Press Release, AT&T, AT&T Plans Roughly \$250 Million in Network Investments in 2008 (June 27, 2008) (announcing that AT&T "continues to invest heavily in its wired network in Connecticut, expanding the reach of its AT&T U-verse services, a triple-play of phone, TV and Internet services that run over a fiber-rich network to neighborhoods in more than 80 cities and towns across Connecticut"); Press Release, AT&T, AT&T Announces Significant 3G Wireless Rollout in Connecticut; Recent Expansion Builds Upon AT&T's \$850 Million Investment in the State (June 11, 2009) (announcing that "AT&T has plans to expand AT&T U-verse to more [Connecticut] towns later this year").

## V. DEFENDANTS HAVE NOT UNLAWFULLY EVADED THE PROGRAM ACCESS RULES

Count III of AT&T's Complaint is a "throw-away" argument for which AT&T has no support, and in support of which it provides no facts. If this were an action in U.S. District Court, Defendants would be entitled to dismissal of this claim under the Supreme Court's test in *Bell Atlantic Corp. v. Twombly*<sup>275/</sup> and *Ashcroft v. Iqbal*,<sup>276/</sup> in which the Court held that a complainant must provide a factual predicate for its claims sufficient to render those claims plausible. All that AT&T does in Count III is suggest "on information and belief" that Defendants have no legitimate business justification for delivering MSG HD and MSG+ HD terrestrially or for their licensing decisions for MSG HD and MSG+ HD.<sup>277/</sup> The Commission's precedents indicate that a claim of unlawful evasion of the program access rules is a fact-based inquiry, but AT&T has offered no facts at all to support its claim.<sup>278/</sup>

Nothing in the Complaint offers any evidentiary support for a conclusion that "the totality of circumstances" underlying the decision to distribute MSG HD and MSG+ HD terrestrially

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<sup>275/</sup> 550 U.S. 544 (2007).

<sup>276/</sup> 129 S. Ct. 1937 (2009).

<sup>277/</sup> Complaint ¶ 101.

<sup>278/</sup> The Commission's authority to police "evasions" of its program access rules is by no means settled and is not supported by the language of the statute. Where Congress meant to include authority to prevent "evasions" of provisions of the 1992 Cable Act, it did so explicitly. In section 623(h) of the Act (related to rate regulation), enacted simultaneously with section 628, Congress provided that "the Commission shall, by regulation, establish standards, guidelines, and procedures to prevent evasions . . . of the requirements of this section." 47 U.S.C. § 543(h). The grant of specific authority to the Commission in section 623 to police evasions of the rate regulation rules militates against a conclusion that Congress invested the Commission with such authority in Section 628. *See, e.g., Moshe Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1990); *Russello v. United States*, 463 U.S. 16, 23, 78 (1983). In prior program access cases involving terrestrially-delivered services, the Commission has not resolved the legal question of whether it has such power, but instead assumed such authority and then ruled it unnecessary to exercise any such assumed power on the facts presented. In *EchoStar Commc'ns Corp. v. FCC*, 292 F.3d 749, 755 (D.C. Cir. 2002), the D.C. Circuit upheld the Commission's ruling in the *Comcast SportsNet* cases without ever confronting the threshold question of whether the Commission has authority to regulate "evasions" of section 628.



“demonstrates an intent to evade” the Commission’s rules.<sup>279/</sup> Nor could it, since, as described above, Defendants’ decision to utilize terrestrial delivery was animated by legitimate business considerations and predated AT&T’s entry into video by more than seven years. In other unsuccessful program access complaints alleging an unlawful evasion, the evidence indicated that at least some programming was shifted from satellite to terrestrial delivery.<sup>280/</sup> By contrast, MSG HD and MSG+ HD were never transmitted via satellite, thereby offering an even less compelling case for an “evasion” allegation than other claims previously rejected by the Commission. Thus, any claim that Defendants somehow have “evaded” the program access rules by *continuing* to deliver these services terrestrially is not grounded in any Commission rule or order.

AT&T’s suggestion that the decision to utilize terrestrial delivery for MSG HD and MSG+ HD was driven by a desire to prevent competitors from accessing the HD programming services pursuant to the program access rules is absurd.<sup>281/</sup> No distributor other than Cablevision expressed any interest in distributing those services for nearly five years after their launch.<sup>282/</sup> As set forth above, terrestrial delivery of MSG HD was in fact the only sensible option when Defendants launched the service in 1998 (and likewise for MSG+ HD in 1999), since (among the other reasons described herein) Cablevision, the only video provider interested in distributing that programming, had an existing fiber network that could be utilized.<sup>283/</sup> Incurring satellite

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<sup>279/</sup> *DirecTV Order* ¶ 25; *EchoStar Order* ¶ 21; *RCN Order* ¶ 22.

<sup>280/</sup> *See, e.g., DirecTV Order* ¶¶ 24-25.

<sup>281/</sup> *See Complaint* at ¶ 101.

<sup>282/</sup> Pontillo Declaration ¶ 15.

<sup>283/</sup> *See Pontillo Declaration* ¶¶ 11, 14.

transponder costs under such circumstances would have made no sense, particularly since few households owned HD televisions and demand for HD programming was wholly unproven.<sup>284/</sup>

When other distributors began to explore carriage of MSG HD and MSG+ HD more than five years after the launch of MSG HD, terrestrial distribution of those offerings was by then firmly established, and it made sense both logistically and economically that any additional distribution also be made in the same manner.<sup>285/</sup> Further, Defendants continued to see no rationale for bearing the substantial costs associated with leasing transponder space for the HD services, which would have been significantly more expensive than leasing transponder space for the SD services due to the far higher bandwidth requirements.<sup>286/</sup> Delivery over a fiber-based network not only significantly reduced signal delivery costs for MSG HD and MSG+ HD, it also offered a more efficient and reliable means of accommodating the greater bandwidth demands of HD program services, ensured a higher picture quality, and preserved the ability to add and expand two-way features associated with the service.<sup>287/</sup>

To the extent that a programmer has valid business reasons for utilizing terrestrial delivery – as MSG does with respect to the program services sought by AT&T – such reasons “necessarily preclude[]” a finding of improper purpose in violation.<sup>288/</sup> The Complaint offers no basis for examining – let alone finding – whether Defendants decision to utilize terrestrial delivery was motivated by “an intent to evade” Commission rules. Accordingly, AT&T’s evasion claim should be rejected.

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<sup>284/</sup> *Id.*

<sup>285/</sup> *Id.* ¶¶ 14-20.

<sup>286/</sup> *Id.*

<sup>287/</sup> *Id.*

<sup>288/</sup> *EchoStar Commc'ns Corp. v. FCC*, 292 F.3d 749, 755 (D.C. Cir. 2002).

**VI. DEFENDANTS HAVE NOT VIOLATED THE “UNDUE INFLUENCE”  
PROVISION OF THE PROGRAM ACCESS RULES**

AT&T alleges in Count IV that “Defendant Cablevision is exercising undue or improper influence over Madison Square Garden’s decision not to license to AT&T the HD format of MSG and MSG Plus.”<sup>289/</sup> Section 628(c)(2)(A) of the Cable Act, however, only restricts cable operators from “unduly or improperly influencing” the decision of an affiliated programmer in connection with selling “satellite cable programming.”<sup>290/</sup> As with all of the other counts in the Complaint that ignore this fundamental statutory limitation, Count IV of the Complaint is defective on its face, because the programming at issue is not “satellite cable programming.”<sup>291/</sup>

The Commission has previously held that the prohibition against undue influence cannot be used to obtain access to terrestrial programming. In challenging its inability to gain access to Comcast SportsNet in Philadelphia, EchoStar argued that Comcast “unduly influenced the decision of Comcast Spectacor and Philadelphia Media, L.P. to deny EchoStar the opportunity to carry the regional sports programming in violation of Section 628(c)(2)(A).”<sup>292/</sup> The Commission, however, ruled that because “we find that SportsNet is not satellite cable programming, we deny EchoStar’s . . . Section 628(c)(2)(A) undue influence claim.”<sup>293/</sup> The Complaint offers no basis for reaching a different outcome here.

In addition, while AT&T specifically describes what it believes are the motive and opportunity for Cablevision to engage in undue influence over MSG, it offers no evidence that

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<sup>289/</sup> Complaint ¶ 105.

<sup>290/</sup> 47 U.S.C. § 548(c)(2)(A).

<sup>291/</sup> *See supra* at Section II.

<sup>292/</sup> *EchoStar Order* ¶ 13.

<sup>293/</sup> *Id.* ¶ 21. *See also DirecTV Order* ¶¶ 23, 25.

any such influence actually occurred.<sup>294/</sup> Nevertheless, even if AT&T's contention were true, it is not unlawful for a company to decide that a subsidiary programming service not subject to forced sharing under Section 628 should be used as a competitive differentiator. In contrast to the regime imagined by AT&T, the Commission has never construed its program access rules to effectively require cable companies to recuse themselves from MVPD licensing decisions involving affiliated programming. To the contrary, the Commission has ruled specifically that in "enacting Section 628, Congress determined that while cable operators generally must make available to competing MVPDs vertically-integrated programming that is satellite-delivered, they do not have a similar obligation with respect to programming that is terrestrially-delivered."<sup>295/</sup>

The Cable Act expressly authorizes cable operators to petition the Commission for approval of an exclusive contract with respect to affiliated satellite cable programming under certain circumstances.<sup>296/</sup> Since subparagraph (D) of Section 628(c)(2) presupposes exclusive contracts between cable operators and affiliated programmers will be permissible under some circumstances, it strains credulity (and violates basic tenets of statutory construction) to suppose

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<sup>294/</sup> Complaint ¶ 105. The Commission has noted that "the concept of undue influence between affiliated firms is closely linked with discriminatory practices" governed by its rules under Section 628(c)(2)(B) – as well as the rules barring exclusivity for satellite cable programming – and that it expected Section 628(c)(2)(A) to "play a supporting role" in connection with actions thereunder. *Program Access First Report and Order* ¶ 145. Accordingly, to the extent necessary, Cablevision incorporates by reference into its defense of Count IV, its discussion in response to the discrimination claim proffered by AT&T in Count V.

<sup>295/</sup> *DirecTV Order* at ¶ 32. Cablevision and its wholly-owned MSG subsidiary by definition "have a complete unity of interest." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771 (1984). As a matter of law, therefore, Cablevision cannot "improperly influenc[e] the decision[s]" of MSG within the meaning of Section 628(c)(2)(A). Entities that "have a complete unity of interest" do not make separate decisions; rather, "[t]heir objectives are common, not disparate; their general corporate actions are guided or determined not by two separate consciousnesses, but one." *Copperweld*, 467 U.S. at 771. The same principles apply to two corporations under common ownership. See, e.g., *Puerto Rico Pharmaceuticals, Inc. v. Pfizer Corp.*, 296 F. Supp. 2d 69, 70 n.4 (D.P.R. 2003).

<sup>296/</sup> 47 U.S.C. § 548(c)(2)(D)(4); 47 C.F.R. ¶ 76.1002(c)(5); *Program Access First Report and Order* ¶ 67 (authorizing cable operators to seek pre-approval from the Commission for exclusive contracts involving satellite cable programming).

Congress intended for subparagraph (A) to bar any cable company involvement in licensing decisions by a subsidiary programming service not subject to forced sharing.<sup>297/</sup>

Indeed, such a reading of subparagraph (A) also would effectively negate the Congressional decision to establish a mechanism for the sunset of the ban on exclusivity in subparagraph (D).<sup>298/</sup> It makes no sense to suppose that Congress intended that, following effectuation of the sunset of the exclusivity ban contemplated under Section 628(c)(2)(D)(5), the “undue influence” restriction in Section 628(c)(2)(A) would nonetheless bar cable operators from negotiating or enforcing otherwise-permissible exclusivity provisions.<sup>299/</sup>

AT&T’s claim under Count IV not only is defective as a matter of law, it also is inconsistent with fundamental economic principles. The Complaint alleges that, “but for Madison Square Garden’s affiliation with Cablevision, Madison Square Garden would have economic incentives to license” MSG HD and MSG+ HD to AT&T.<sup>300/</sup> To suggest that it is somehow “undue” for a vertically-integrated cable company to forego distribution revenue that may be available from licensing its programming to an unaffiliated competitor in order for the distribution arm of the business to differentiate its product offering is tantamount to an outright condemnation of both vertical integration and exclusivity – neither of which was intended by

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<sup>297/</sup> See e.g. *Gade v. National Solid Wastes Management Ass’n*, 505 U.S. 88, 100-01 (1992) (indicating that courts should avoid interpreting the text of a provision inconsistently with the necessary assumptions of another statutory provision); *King v. St. Vincent’s Hosp.*, 502 U.S. 215, 221 (1991) (“[We] follow the cardinal rule that a statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context.”); *Fawn Mining Corp. v. Hudson*, 80 F.3d 519, 523 (D.C. Cir. 1996).

<sup>298/</sup> 47 U.S.C. § 548(c)(2)(D)(5).

<sup>299/</sup> See, e.g., *United Savings Ass’n of Texas v. Timbers of Inwood Forest Associates*, 484 U.S. 365, 371 (1988) (Interpretation of a statute is “a holistic endeavor,” and statutory language must be read in a manner that is “compatible with the rest of the law”); *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 118 U.S. 26, 36 (1998) (applying “that central tenet of interpretation, that a statute is to be considered in all its parts when construing any one of them”).

<sup>300/</sup> Complaint ¶ 105.

Congress when it enacted the Cable Act.<sup>301/</sup> Such a suggestion also ignores the substantial promotional, marketing and other benefits relating to MSG HD and MSG+ HD that MSG receives from Cablevision.

Firms routinely opt to forego revenue that might otherwise be gained from licensing an input to non-affiliates in order to benefit another arm of a shared enterprise.<sup>302/</sup> For example, exclusive television content distribution arrangements between broadcast or cable channels and their affiliated production companies are common, notwithstanding the fact that the production affiliate may give up significant license fees by not licensing its shows to multiple networks.<sup>303/</sup> This dynamic, in fact, typically underlies exclusive arrangements undertaken by vertically-integrated entities. The prospect of reaping the exclusive benefits and rewards of an investment in a key input – and using those benefits as a means of differentiating one firm from another in the marketplace – is precisely why exclusivity is considered to be a beneficial driver of investment, innovation and consumer welfare.<sup>304/</sup>

AT&T's broad construction of the undue influence provision of Section 628 would effectively outlaw in perpetuity all exclusive arrangements between cable operators and affiliated programmers, in defiance of Congress' express decision to temporarily restrict only certain types of such arrangements. It also would amount to a Federal condemnation of the benefits of

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<sup>301/</sup> The Commission long ago recognized that cable operator ownership of, and involvement in, the cable program content business has engendered substantial benefits for consumers. *See Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service*, 5 FCC Rcd. 4962, ¶ 78 (1990) ("1990 Competition Report") (vertical integration "increased both the quality and quantity of program services available to the viewing public"); *id.* ¶¶ 82-85 (vertical integration has led to investment in better programming and resulted in more viewing options for consumers).

<sup>302/</sup> *See* Bulow/Owen at 16-17.

<sup>303/</sup> *See id.*

<sup>304/</sup> *See* Bulow/Owen at 16.

exclusivity, an outcome unwarranted as a matter of both law and policy. The Commission should reject AT&T's undue influence claim.

**VII. DEFENDANTS HAVE NOT ENGAGED IN UNLAWFUL DISCRIMINATION BY DECLINING TO PROVIDE AT&T A LICENSE FOR MSG HD AND MSG+ HD**

AT&T alleges in Count V that Defendants' decision to license the terrestrially-delivered MSG HD and MSG+ HD services to some other MVPDs, but not to AT&T, is discriminatory.<sup>305/</sup> This claim is defective on its face, since it aims to compel access to terrestrial programming that is outside the ambit of Section 628(c). Because the anti-discrimination provisions of the program access rules only prohibit discrimination in "the prices, terms, and conditions of sale or delivery of *satellite cable programming*,"<sup>306/</sup> AT&T's discrimination claim must fail.

As a threshold matter, Count V is procedurally barred by the Commission's rules because AT&T's 10-day letter offered no notice or description of a claim of unlawful discrimination in the terms and conditions of sale of satellite cable programming. The Commission's rules specifically "require that prior to filing a discrimination complaint, an aggrieved MVPD must first inform the programming vendor of its belief that discriminatory behavior has occurred."<sup>307/</sup> The rules envision that such notice of a discrimination claim would be provided in the 10-day letter,<sup>308/</sup> and would be "sufficiently detailed so that the vendor can determine the specific nature of the complaint."<sup>309/</sup> In AT&T's 10-day letter, however, neither the word "discrimination" nor the Commission rule proscribing discriminatory programming contracts for satellite cable programming are mentioned. Nor does the Complaint contain any indication that the other

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<sup>305/</sup> Complaint ¶ 110.

<sup>306/</sup> 47 C.F.R. § 76.1002(b).

<sup>307/</sup> *Program Access First Report and Order* ¶ 124.

<sup>308/</sup> *See id.* at n.221.

<sup>309/</sup> *Id.*, ¶ 124.

prerequisites to filing a discrimination claim set forth in Section 76.1003(c)(4) of the Commission's rules have been satisfied.<sup>310/</sup> For these reasons alone, Count V must be dismissed.

AT&T's claim in Count V is also defective as a matter of law, because the Commission's anti-discrimination rules cannot be invoked to obtain compelled access to programming that is not subject to Section 628. The outcome sought by AT&T would violate the Commission's rules by negating the legal significance of both the mode of program delivery and the separable licensing regime established by the programmer.

It is not unlawfully discriminatory for Defendants to decline to grant AT&T a license for programming not covered by the program access rules. Section 628(c) is aimed only at prohibiting discrimination in the sale of "satellite cable programming."<sup>311/</sup> The Commission has ruled that its anti-discrimination rules do not cover the terms or conditions under which terrestrial programming is or is not provided to MVPDs.<sup>312/</sup> Most recently, in its order imposing conditions upon the transfer of the Adelphia cable systems to Comcast and Time Warner, the Commission specifically noted that the normal operation of its program access rules "would not prevent either firm from withholding [terrestrially-delivered RSN] programming from its rivals or engaging in discriminatory pricing."<sup>313/</sup> A discrimination claim predicated upon the inability to distribute programming not subject to the program access rules cannot be cognizable under

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<sup>310/</sup> 47 C.F.R. §76.1003(c)(4)

<sup>311/</sup> 47 U.S.C. §§ 548(c)(2)(A), (B).

<sup>312/</sup> *DirecTV Order* ¶ 23 (noting that 628(c)(2)(B) prohibits discrimination in the sale of satellite cable programming violation for refusal to license Comcast SportsNet); *id.* ¶ 25 (rejecting Section 628(c) claims); *Comcast SportsNet Order on Review*, ¶ 12 (holding that a terrestrially-delivered service is "outside of the direct coverage of Section 628(c)").

<sup>313/</sup> *Adelphia Transfer Order* ¶ 161.



Section 628. To hold otherwise would nullify the Congressional decision to exclude terrestrial programming from the program access rules.

AT&T's "understanding" that MSG HD and MSG+ HD are simply "part of carriage agreements governing the standard definition feeds of those networks" is incorrect.<sup>314/</sup> The HD program services and the SD program services are distinct offerings that are separately licensed.<sup>315/</sup> AT&T itself distinguishes between its SD and HD offerings, highlighting the number of HD program services it carries (counting each such service as an additional service), listing each such HD service separately on its program listing guide, and offering HD program to customers as part of a level of service for which it charges subscribers additional fees.<sup>316/</sup>

Not only are MSG HD and MSG+ HD separately licensable programming services, each service occupies its own distinct swath of bandwidth, its own channel position, utilizes a different transmission path and signal delivery method, is processed by different signal reception equipment at MVPD headends, and is subject to different carriage arrangements.<sup>317/</sup> Distributors also receive separate local ad avails on the MSG HD and MSG+ HD services from those on the satellite-delivered MSG and MSG+ services, and the underlying content shown on the terrestrially-delivered MSG HD and MSG+ HD services offerings will not necessarily always be the same as that found on the satellite-delivered services.<sup>318/</sup>

AT&T errs by suggesting that it is subject to discrimination because some (though by no means all) licensees of the satellite-delivered, standard-definition MSG and MSG+ services also

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<sup>314/</sup> Complaint ¶ 49.

<sup>315/</sup> See Levine Declaration ¶¶ 4, 13.

<sup>316/</sup> See *supra* nn. 268-269.

<sup>317/</sup> Levine Declaration ¶ 13.

<sup>318/</sup> *Id.*

distribute the terrestrially-delivered MSG HD and MSG+ HD program services.<sup>319/</sup> But that reflects nothing more than the fact that the standard-definition and high-definition program services are separately licensable, and MSG has chosen to license some distributors each offering. That circumstance is no different from the fact that a license to distribute a linear program network does not also automatically impart an entitlement to a license to distribute that network (or its content) over the Internet, to mobile devices or on a video-on-demand basis.

The fact that Defendants make terrestrially-delivered MSG HD and MSG+ HD program services available to some other distributors is not evidence of “discrimination” against AT&T,<sup>320/</sup> but is rather a reflection of Defendants’ rational and lawful choice of means to differentiate themselves from other MVPDs. For instance, DirecTV lacks a “triple play” offering, enabling Defendants to differentiate their services from DirecTV in ways other than with respect to MSG HD and MSG+ HD, *e.g.*, through bundling voice and internet access, the so-called “triple play” strategy.<sup>321/</sup> This distribution strategy simply takes account of the effects of using particular distributors, both on programming revenue and on video distribution costs and revenue. Since AT&T does have a triple play offering, Defendants must look for other means to distinguish their retail product from AT&T’s.<sup>322/</sup>

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<sup>319/</sup> See Complaint ¶ 111.

<sup>320/</sup> See *Complaint* at 28, 32.

<sup>321/</sup> See Bulow/Owen at 5 (“That Cablevision/MSG license HD programming services to other distributors does not undermine the economic analysis. Cablevision/MSG follows a selective licensing distribution strategy; it does not compete with, and thus need not differentiate its product from those offered by Comcast. Cablevision can and does differentiate its product offerings from DirecTV in other ways (*e.g.* through bundling voice and internet access, the so-called ‘triple play’ strategy). . . Denying MSG HD and MSG+ HD to AT&T simply makes it easier for Cablevision to distinguish its retail product from AT&T’s”).

<sup>322/</sup> Bulow/Owen at 4-5.

Count V should be dismissed because it is defective as a procedural matter and not cognizable as a matter of substance.

**VIII. FORCED SHARING IS UNNECESSARY IN THE INSTANT CASE BECAUSE COMPETITION HAS TAKEN FIRM ROOT IN THE AREAS WHERE CABLEVISION COMPETES WITH AT&T**

Even if the Commission concluded that it had the authority to apply the restrictions of Section 628 to terrestrial programming, the robust competition for video services in the areas of Connecticut where AT&T competes with Cablevision militates against government intervention. The FCC has already determined that Cablevision faces effective competition in each of the Connecticut communities in which it offers services and competes with AT&T.<sup>323/</sup> Consumers in the Connecticut areas served by Cablevision and AT&T today have a choice of four different MVPDs: Cablevision, AT&T, DirecTV, and Dish Network. In such a highly competitive marketplace, each provider is driven to respond to market forces by investing in risky and innovative offerings in order to differentiate itself from other providers, thereby enhancing consumer welfare.<sup>324/</sup>

Consumers in the portions of Connecticut where AT&T competes with Cablevision are clearly reaping the benefits of a thoroughly competitive marketplace. Not only are Cablevision and AT&T undertaking vigorous efforts to differentiate themselves,<sup>325/</sup> but DirecTV (which continues to offer NFL Sunday Ticket and other exclusive programming) and Dish Network (which has exclusive distribution rights to numerous foreign language programming services) are substantial competitors as well.<sup>326/</sup> The competitive forces unleashed by this competition are

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<sup>323/</sup> See *supra* n.40.

<sup>324/</sup> See Bulow/Owen at 4-5.

<sup>325/</sup> See *supra* at 12-13; 42-43, 52-55.

<sup>326/</sup> See *supra* at n. 42.

clearly helping to expand the quantity, quality, and diversity of services available to consumers there.

The courts and the Commission have emphasized that mandatory asset-sharing arrangements like the program access law are appropriate only where a “granular analysis” of local market conditions demonstrates that competition will be impaired absent the provision of unbundled network elements to competitors.<sup>327/</sup> In considering the merits of market-by-market relief from asset-sharing obligations imposed on the telephone companies, the Commission has held that “it could be appropriate to conclude, based on sufficient facilities-based competition, particularly from cable companies, that the state of local competition might justify forbearance from unbundling obligations.”<sup>328/</sup> Such a conclusion is equally true with respect to asset-sharing obligations applicable to cable operators.<sup>329/</sup> Indeed, AT&T itself has argued vigorously that asset-sharing arrangements should not be applied in competitive local markets.<sup>330/</sup>

Even without guaranteed access to terrestrial programming, AT&T nonetheless has invested substantial capital deploying video-capable broadband network infrastructure to

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<sup>327/</sup> See, e.g., *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978, ¶ 118 (2003) (“*Triennial Review Order*”) (citing *United States Telecom Ass’n v. FCC*, 290 F.3d 415, 422 (D.C. Cir. 2002) (“*USTA I*”)) (subsequent history omitted); *Unbundled Access to Network Elements*, 20 FCC Rcd. 2533, ¶ 8 (2005) (“*Triennial Review Remand Order*”) (noting *USTA I* rejected national sharing rules because they were “insufficiently ‘granular’” and “did not account for differences in particular markets and particular customer classes”), *aff’d Covad Commc’ns Co. v. FCC*, 450 F.3d. 528, 544 (D.C. Cir. 2006) (“*USTA I* and *USTA II* require a nuanced application of a ‘granular’ impairment standard, which incorporates competitive variations within and across markets”).

<sup>328/</sup> *Petition of ACS of Anchorage, Inc., Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, 22 FCC Rcd. 1958, ¶ 5 (2007).

<sup>329/</sup> Cf. *Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 FCC Rcd 2533, ¶ 2 (2004) (noting benefits of using “unbundling authority in a more targeted manner”).

<sup>330/</sup> See *Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket 04-313, Reply Comments of SBC, at 2 (filed Oct. 19, 2004) (forced sharing of ILEC network elements “cannot be permitted in competitive markets”).

thousands of homes in dozens of large and small communities in Connecticut. AT&T enjoys a network footprint, market reach, and financial resources of unmatched size and strength – and it has been providing communications services to the vast majority of households in that marketplace for decades. Along with DirecTV and Dish Network, AT&T is clearly a strong and durable competitor firmly committed to providing service in Connecticut.

Consumers are better served by having MVPDs compete through product differentiation strategies, than by compelling rivals to offer copycat versions of the same product.<sup>331/</sup> AT&T itself has stated “Exclusive marketing and distribution arrangements are simply one more form of beneficial product differentiation.”<sup>332/</sup> As detailed above, AT&T is pursuing its own competitive differentiation strategies in the video business,<sup>333/</sup> and the intensifying competition will fuel similar efforts by other competitors in the marketplace that seek to make their product offerings more unique and attractive. The end result will be to foster new services and more choices, thereby enhancing consumer welfare.<sup>334/</sup>

Accordingly, to the extent the Commission concludes that it has authority to address access to terrestrial programming, it should refrain from doing so here because Connecticut consumers already are well-served by the range of video choices and advanced services made available by the operation of competitive forces.

## **IX. AT&T’S REQUEST FOR PENALTIES SHOULD BE DENIED**

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<sup>331/</sup> See Bulow/Owen at 21 (noting disadvantages associated with policies that “make it cheaper on the margin for non-cable MVPDs to duplicate existing satellite-delivered program options than to develop new ones. Clearly, this acts to discourage an expansion of program supply and diversity”).

<sup>332/</sup> AT&T Wireless Exclusivity Comments at 8.

<sup>333/</sup> See *supra* at 12-13, 42-43, 52-55.

<sup>334/</sup> See Bulow/Owen at 16-17.

AT&T's request for penalties should be denied as wholly without merit. The request is premised on the false notions that Defendants have committed "repeated" program access violations and engaged in "manifestly wrongful conduct in this case" -- both flatly untrue. In most of the cases cited by AT&T, the complaints against Defendants were withdrawn, dismissed, or dismissed with prejudice.<sup>335/</sup> The mere existence of past complaints that have been settled without any finding of liability cannot serve as the basis for a finding of a "repeated" violation since such cases have no precedential value.<sup>336/</sup>

In any event, the facts before the Commission in this case do not warrant the imposition of penalties. There is no basis for finding that Defendants are engaging in conduct that is in clear contravention of the Commission's rules. To the contrary, the HD programming services at issue are delivered terrestrially, and such services have repeatedly been determined by the Commission to be outside the ambit of the program access rules.<sup>337/</sup>

## IX. RESPONSES TO NUMBERED PARAGRAPHS

Pursuant to 47 C.F.R. § 76.7(b)(2)(iv), Defendants generally deny any allegation not specifically admitted below, and furthermore hereby respond to the particular averments in AT&T's Complaint. Corresponding below to the numbered paragraphs in the Complaint, Defendants:

1. Admit that AT&T is an MVPD.

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<sup>335/</sup> See Complaint ¶ 112; *AT&T Telephone Companies and AT&T Services Corp. v. Cablevision Systems Corporation and Rainbow Media Holdings LLC*, Order, 21 FCC Rcd 13387 (2006); *EchoStar Communications Corp. v. Rainbow Media Holdings, Inc.*, 13 FCC Rcd 5252 (1998); *RCN Telecom Services of New York, Inc. et al. v. Cablevision Systems Corporation, Rainbow Media, et al.*, 16 FCC Rcd 12048 (2001) (denying RCN's petition for review of Bureau dismissal of program access complaint).

<sup>336/</sup> See, e.g., *Stearns Airport Equipment Co. v. FMC Corp.*, 170 F.3d 518, 524 n.3 (5<sup>th</sup> Cir. 1999) (stating that decision vacated by settlement agreement has no precedential value); *Georgia-Pacific Corp. v. United States*, 640 F.2d 328, 367 n.55 (Ct. Cl. 1980) ("a settled case has no precedential value").

<sup>337/</sup> See *supra* n.69, and at 24-25.

2. Deny this paragraph to the extent that it varies from Defendants' Factual Overview and Argument above. Deny this paragraph to the extent that it characterizes the relationship between Cablevision and MSG, and to the extent that it suggests that the programming on MSG and MSG HD and MSG+ and MSG+ HD are the same.

3. Deny that MSG, MSG+, MSG HD, or MSG+ HD are "must have" programming, or that HD is a "must have" format. Deny that AT&T cannot compete effectively, or that its ability to do so is impaired, without MSG, MSG+, MSG HD, or MSG+ HD. Deny that the *Adelphia Order* is in any way relevant to AT&T's Complaint.

4. Deny that MSG, MSG+, MSG HD, or MSG+ HD are "must have" programming, or that HD is a "must have" format. Deny that AT&T cannot compete effectively, or that its ability to do so is impaired, without MSG, MSG+, MSG HD, or MSG+ HD. Deny that the *NewsCorp Order* or the *2002 Order* is in any way relevant to AT&T's Complaint.

5. Deny this paragraph to the extent that it varies from Defendants' Factual Overview and Argument above. Deny this paragraph to the extent that it suggests that the programming on MSG and MSG HD and MSG+ and MSG+ HD are the same, and deny that the only difference between MSG and MSG HD and MSG+ and MSG+ HD is the format. Deny that MSG, MSG+, MSG HD, or MSG+ HD are "must have" programming, or that HD is a "must have" format.

6. Deny this paragraph to the extent that it varies from Defendants' Factual Overview and Argument above. Deny this paragraph to the extent that it suggests that the programming on MSG and MSG HD and MSG+ and MSG+ HD are the same, and deny that the only difference between MSG and MSG HD and MSG+ and MSG+ HD is the format. Deny this paragraph to the extent that it implies that Defendants provide MSG HD and MSG+ HD to all of

AT&T's competitors. Deny that Defendants have no legitimate, non-discriminatory basis for any of their actions. Deny AT&T's statement in footnote 10 that Defendants would have every incentive to license MSG HD and MSG+ HD to AT&T "and would do so, were it not for Cablevision's desire to inhibit AT&T's ability to compete effectively in the downstream distribution market in Connecticut."

7. Deny this paragraph in its entirety.

8. Deny that AT&T's request should be granted.

9. Deny that the Commission has jurisdiction to consider this Complaint under 47 U.S.C. § 548(d) or 47 C.F.R. § 76.1003 as MSG HD and MSG+ HD are not "satellite cable programming" or "satellite broadcast programming."

10. Deny that full Commission action is necessary to deny this Complaint based on existing, clear precedents. Deny that this is a case of first impression or that AT&T's Complaint raises any novel question of law.

11. Deny this paragraph in its entirety.

12. Lack information to either admit or deny AT&T's characterization of its operations.

13. Lack information to either admit or deny AT&T's characterization of its internal corporate structure.

14. Admit that AT&T is an MVPD.

15. Lack information to either admit or deny AT&T's address.

16. Deny this paragraph to the extent that it varies from Defendants' Factual Overview and Argument above. Admit that Cablevision is a cable operator in New York and Connecticut.



17. Admit that Cablevision is a cable operator.

18. Admit this paragraph. Any inquiries to Cablevision should be directed to undersigned counsel.

19. Deny this paragraph to the extent that it varies from Defendants' Factual Overview and Argument above. Deny this paragraph to the extent that it suggests that the programming on MSG and MSG HD and MSG+ and MSG+ HD are the same, and deny that the only difference between MSG and MSG HD and MSG+ and MSG+ HD is the format.

20. State that the referenced order speaks for itself.

21. Admit the truth of the material cited from Cablevision's SEC form 10-K.

22. Deny this paragraph to the extent that it varies from Defendants' Factual Overview and Argument above. Deny this paragraph to the extent that it suggests that the programming on MSG and MSG HD and MSG+ and MSG+ HD are the same, and deny that the only difference between MSG and MSG HD and MSG+ and MSG+ HD is the format.

23. Deny this paragraph to the extent that it varies from Defendants' Factual Overview and Argument above. Admit that MSG has exclusive rights to exhibit games of the professional sports teams named in this paragraph within a certain geographic region. Admit ownership of the New York Knicks and New York Rangers. Otherwise deny the last two sentences of this paragraph.

24. Admit that MSG and MSG+ are "satellite cable programming." Deny that MSG HD and MSG+ HD are "satellite cable programming." Deny this paragraph to the extent that it suggests that the programming on MSG and MSG HD and MSG+ and MSG+ HD are the same, and deny that the only difference between MSG and MSG HD and MSG+ and MSG+ HD is the format. Deny that "the underlying programming itself is satellite-delivered."

25. Admit that MSG is a “satellite cable programming vendor” only to the extent that it licenses certain satellite cable programming not at issue in this case. Deny any implication that MSG HD and MSG+ HD are “satellite cable programming.”

26. Deny this paragraph to the extent it implies that MSG HD and MSG+ HD are “satellite cable programming” or that MSG is a satellite cable programming vendor in which a cable operator has an attributable interest with respect to MSG HD or MSG+ HD.

27. Deny this paragraph to the extent that it contains the incorrect address. MSG’s address is Two Pennsylvania Plaza, New York, NY 10121. Any inquiries to MSG should be directed to undersigned counsel.

28 – 77. Deny all averions in these paragraphs and substitute Defendants’ Factual Overview and Argument above.

78. Neither admit nor deny this paragraph as it simply incorporates prior paragraphs, which Defendants have addressed individually.

79. Deny any implication that Defendants have engaged in any unfair methods of competition or unfair or deceptive acts or practices, or that AT&T is in any way hindered or prevented from providing satellite cable programming to subscribers or consumers. Deny any implication that MSG HD or MSG+ HD are “satellite cable programming.”

80. Deny that Madison Square Garden is a “satellite cable programming vendor” with regard to MSG HD and MSG+ HD.

81. Admit this paragraph.

82. Deny any implication that MSG HD or MSG+ HD are “satellite cable programming.”

83. Deny this paragraph in its entirety.

84. Deny this paragraph in its entirety.

85. Deny this paragraph in its entirety.

86. Deny this paragraph in its entirety.

87. Deny this paragraph in its entirety.

88. Deny this paragraph in its entirety.

89. Neither admit nor deny this paragraph as it simply incorporates prior paragraphs, which Defendants have addressed individually.

90. Deny any implication that Defendants have unreasonably refused to license MSG HD or MSG+ HD to AT&T. Deny any implication that MSG HD and MSG+ HD is "satellite cable programming."

91. Deny that Madison Square Garden is a "satellite cable programming vendor" with regard to MSG HD and MSG+ HD.

92. Admit this paragraph.

93. Admit that MSG and MSG+ are satellite cable programming. Deny that MSG HD and MSG+ HD are "satellite cable programming." Deny this paragraph to the extent that it suggests that the programming on MSG and MSG HD and MSG+ and MSG+ HD are the same, and deny that the only difference between MSG and MSG HD and MSG+ and MSG+ HD is the format. Deny that the "underlying programming" of MSG HD and MSG+ HD is satellite-delivered.

94. Deny this paragraph in its entirety.

95. Deny this paragraph in its entirety.

96. Deny this paragraph in its entirety.

97. Deny this paragraph in its entirety.

98. Deny this paragraph in its entirety.

99. Neither admit nor deny this paragraph as it simply incorporates prior paragraphs, which Defendants have addressed individually.

100. State that the cited orders speak for themselves.

101. Deny this paragraph in its entirety.

102. Deny this paragraph in its entirety.

103. Neither admit nor deny this paragraph as it simply incorporates prior paragraphs, which Defendants have addressed individually.

104. State that the cited provisions speak for themselves.

105. Deny this paragraph in its entirety.

106. Deny this paragraph in its entirety.

107. Neither admit nor deny this paragraph as it simply incorporates prior paragraphs, which Defendants have addressed individually.

108. State that the cited provisions speak for themselves.

109. Admit that AT&T is an MVPD. Deny this paragraph to the extent that it suggests that the programming on MSG and MSG HD and MSG+ and MSG+ HD are the same, and deny that the only difference between MSG and MSG HD and MSG+ and MSG+ HD is the format.

110. Deny this paragraph in its entirety.

111. Deny this paragraph in its entirety.

112. Deny that penalties are warranted.

Request For Relief: Deny that any relief is warranted.

CONCLUSION

As demonstrated above, Defendants have not violated the Cable Act or the Commission's rules, and there is no legal basis for compelling them to provide the terrestrially-delivered MSG HD and MSG+ HD services to AT&T. Accordingly, the Complaint should be dismissed.<sup>339/</sup>

Respectfully submitted,



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September 17, 2009

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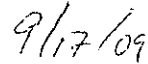
<sup>339/</sup> If the Commission were to rule in favor of AT&T, it would have to contravene a long of line previous orders holding that terrestrial programming is not subject to Section 628. Under these circumstances, there would be no justification for requiring Defendants to provide confidential and competitively sensitive programming contract information to AT&T. The Commission has not previously required an unsuccessful program access defendant to provide "comparative information on the rates, terms and other conditions" under which the programming is provided to other distributors, and there is no warrant for requiring such action here – particularly given the Commission's clear precedent with respect to access to terrestrially-delivered programming.

VERIFICATION

I, Adam Levine, Senior Vice President of Legal and Business Affairs – MSG Media, do hereby verify that I have read the foregoing and, to the best of my knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and is not intended for any improper purpose.



Adam Levine



Date

**CERTIFICATE OF SERVICE**

I, Ernest C. Cooper, do hereby certify that on this 17<sup>th</sup> day of September, 2009, a true and correct copy of the foregoing Answer was served on counsel for AT&T via FedEx:

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**EXHIBIT 1**

Jeremy I. Bulow and Bruce M. Owen, *Analysis of Competition and Consumer Welfare  
Issues in AT&T's Program Access and 628(b) Complaint Against Cablevision and  
Madison Square Garden*



**Analysis of Competition and Consumer Welfare Issues in AT&T's Program Access and  
628(b) Complaint Against Cablevision and Madison Square Garden**

By Jeremy I. Bulow and Bruce M. Owen<sup>1</sup>

Cablevision Systems Corp. ("Cablevision") and Madison Square Garden L.P. ("MSG") have asked us to analyze from an economic perspective the AT&T complaint regarding the decision of Cablevision/MSG not to license its terrestrially-delivered MSG HD and MSG+ HD program services to AT&T for distribution to its U-verse subscribers in Connecticut. In its complaint, AT&T argues that this decision is anticompetitive because the lack of a license for MSG HD and MSG+ HD reduces AT&T's ability to provide a competing video service.<sup>2</sup>

We analyze these claims and conclude that:

1. AT&T provides no evidence of harm to consumers or to competition from the alleged refusal of Cablevision/MSG to provide MSG HD and MSG+ HD.
  - a. MSG HD and MSG+ HD are not essential to successful entry or to the competitive effectiveness of MVPDs in Connecticut.
  - b. AT&T does not demonstrate that either Cablevision or MSG has monopoly power.
  - c. The fact that MSG HD and MSG+ HD are licensed to Cablevision's direct competitors DirecTV and RCN is strong evidence that there is no barrier here to efficient transactions, and therefore no need for compulsion. Conversely, the absence of a

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<sup>1</sup> Jeremy Bulow is the Richard A. Stepp Professor of Economics at Stanford Business School. He served as the Director of the Bureau of Economics of the Federal Trade Commission from 1998-2001. Bruce Owen is the Morris M. Doyle Centennial Professor in Public Policy at Stanford. He served as chief economist of the Antitrust Division of the U.S. Department of Justice from 1979-1981.

<sup>2</sup> *AT&T Services, Inc. and Southern New England Telephone Company D/B/A AT&T Connecticut v. Madison Square Garden, L.P. and Cablevision Systems Corp.*, Program Access and Section 628(b) Complaint ("Complaint"), August 13, 2009.

deal with AT&T therefore does not stand as evidence of anticompetitive purpose or effect.

2. AT&T fails to demonstrate that Cablevision/MSG's strategy has anti-competitively harmed AT&T.
3. There are important potential consumer welfare benefits from permitting Cablevision/MSG the freedom to pursue a competitive strategy of licensing its content to some competing distributors but not others. These potential benefits include—
  - a. Increased product differentiation, leading to a greater variety of video content and related services in the marketplace, resulting in services attuned to a wider variety of consumer tastes, and
  - b. Increased producer incentives to invest in the future innovative services, product attributes, and content that consumers value most highly.

#### **1. Competition Analysis of AT&T's Complaint**

An examination of the complaint and the available facts rules out the possibility that Cablevision/MSG's terrestrial exclusivity policy (vis-à-vis AT&T—as explained below, it is a selective licensing strategy, not a general policy) is harmful to competition. The fact that MSG HD and MSG+ HD are licensed to Cablevision's direct competitors DirecTV and RCN is strong evidence that there is no barrier here to efficient transactions, and therefore no need for compulsion. Conversely, the absence of a transaction between Cablevision/MSG and AT&T for the licensing of MSG HD or MSG HD+ therefore does not stand as evidence of anticompetitive purpose or effect.

The purpose of selective licensing is to permit Cablevision/MSG to differentiate its product from that of its closest competitors. Product differentiation is competition in "product space," and is

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important to promoting consumer welfare. AT&T has not offered any convincing evidence to support its claim that Cablevision/MSG's marketing strategy impedes competition.

In terms of competition analysis, a conclusion that Cablevision/MSG's alleged refusal to license AT&T for the carriage of its MSG HD and MSG+ HD services is anticompetitive requires the following as necessary conditions:

1. MSG HD and MSG+ HD must be essential (more than "must have" as the Commission uses that term) to an MVPD competing with Cablevision.
2. Cablevision must possess or pose a dangerous threat of acquiring monopoly power in the relevant product and geographic market.

There is no evidence in the Complaint that MSG's HD program services are essential for entry (successful or otherwise) into the business. To the contrary, AT&T itself offers apparently viable retail video distribution service in the Cablevision service areas without offering MSG HD and MSG+ HD. In any event, Cablevision/MSG does not follow a policy of strict exclusivity, even in connection with terrestrial carriage. Instead, it appears to pursue a less restrictive selective licensing strategy, choosing to license some but not other distributors for MSG HD and MSG+ HD both within its own cable franchise areas and outside them. Similarly, the complaint provides no evidence of Cablevision monopoly power.

The traditional analysis starts from the premise that most successful competitive strategies harm competitors. That is why harm to competitors is not useful in deciding whether a strategy harms competition. There is no doubt that AT&T would be better off, at least in the short run, if MSG HD and MSG+ HD were available to it at a regulated price. In the extreme, a policy of requiring Cablevision to license its property to AT&T at cost will maximize AT&T's profits and may even reduce short-run consumer prices. In the long run, however, such a policy would have the same adverse effect on consumers as any severe price control, including deterring innovation.

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The issue, of course, is not whether AT&T could offer a service identical to MSG HD and MSG+ HD, or even whether or not the absence of MSG HD and MSG+ HD from AT&T's lineup, with no other changes, would reduce AT&T's ratio of HD subscribers to total subscribers in Connecticut. Rather, the relevant question from an economic perspective is whether MSG HD and MSG+ HD are so important to successful competition (or entry) that any MVPD lacking them would be forced to offer its customers a significantly inferior service, or be prevented from entering the business. Put another way, the issue is whether AT&T can effectively compete against Cablevision if it cannot offer its subscribers MSG HD and MSG+ HD.

The important point is that AT&T's strategic alternatives are not limited to those that would attract the exact same set of subscribers it would have if it offered MSG HD and MSG+ HD at the price it would then charge. A useful way to consider the issue from AT&T's perspective is to compare AT&T's optimized product with and without the availability of MSG HD and MSG+ HD. For example, by not acquiring these services AT&T could pass along the money it would save to consumers in the form of lower prices, acquire the rights to additional programming to add to its bundles, or develop additional original programming. Indeed, AT&T vigorously promotes its HD services in Connecticut, advertising that subscribers have access to up to 110 HD channels.

Offering that next-best alternative could produce a different set of subscribers than the set AT&T would serve if it did offer MSG HD and MSG+ HD. But this is not the issue. The issue instead is whether MVPDs have available substitute bundles of programming and other service attributes at prices that would permit them to continue as effective competitors at sustainable scales of operation. Here, it would not significantly harm AT&T if the marginal value of acquiring the MSG HD and MSG+ HD rights were approximately equal to the marginal value to AT&T of offering the next-best alternative.

That Cablevision/MSG makes its HD programming available to other distributors does not undermine the economic analysis. Cablevision/MSG follows a selective licensing strategy; it does not compete with, and thus need not differentiate its product from those offered by

Comcast. Cablevision can and does differentiate its product offerings from DirecTV in other ways (e.g., through bundling voice and internet access, the so-called "triple play" strategy). A selective licensing strategy simply takes account of the effects of using particular distributors, both on programming revenue and on video distribution costs and revenue. Denying MSG HD and MSG+ HD to AT&T simply makes it easier for Cablevision to distinguish its retail product from AT&T's.

**2. AT&T fails to demonstrate that Cablevision/MSG's strategy has anti-competitively harmed AT&T.**

AT&T attempts to support its case by presenting data from a survey of HDTV owners and by presenting data on the fraction of its Connecticut subscribers who are willing to pay for its higher-priced HD service. But neither type of evidence answers the question of whether being able to offer MSG HD and MSG+ HD is necessary for AT&T to continue as an effective competitor.

**a. *Estimating the Value of RSN HD Rights***

The CEA study of HDTV owners that AT&T cites<sup>3</sup> does not support its case. The study indicates that the average owner of an HD television watches approximately 29 hours of television per week, of which just about two hours is sports in HD (and another 2.2 hours is sports not in HD). However, over half of sports fans (and 9 in 10 non-fans) cared more about watching movies and other television programming than sports in HD.<sup>4</sup> Furthermore, regional sports networks such as MSG will particularly attract fans interested in local teams, and, assuming the accuracy of the study, the local team is the favorite of only one third of all fans in a market. Extrapolating to the New York market, many New York basketball fans may prefer to watch the Los Angeles Lakers or the Cleveland Cavaliers, whose games will be available in HD on other networks, rather than

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<sup>3</sup> "Second Annual Inside the Mind of the HD Sports Fan Study", Consumer Electronics Association, ("CEA Study") January 2007.

<sup>4</sup> Id., Figure 6, with similar results for expectant HDTV buyers reported in Figure 21

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the New York Knicks. AT&T notes that the study “concluded that ‘48% of HDTV owner sports fans report purchasing their set to watch a specific sporting event,’”<sup>5</sup> but the lack of MSG HD and MSG+ HD does not prevent AT&T’s customers from watching – in HD – any of the top HDTV sales driver sporting events listed by CEA or any of the events in CEA’s list of top sporting events to watch in HD, as all of those events are carried on other networks. It also does not prevent AT&T’s customers from watching in HD any major league baseball or football games.<sup>6</sup> AT&T’s customers can also watch all of the professional games carried on MSG HD and MSG+ HD on the satellite delivered MSG and MSG+ services that are licensed by Cablevision/MSG to AT&T.

In light of these facts the economically relevant inquiry is how it is even possible that not having access to MSG HD and MSG+ HD would cause significant competitive damage to AT&T.

One possibility might be that the audience for a programming service is so large that it is irreplaceable with other networks or with lower prices. For example, a company planning to build a national cell phone network might simply be unable to develop a workable business plan if it could not provide facilities-based coverage in the New York metropolitan area. However, this is not the situation for MSG HD and MSG+ HD. As explained above, even the CEA study upon which AT&T relies does not support its argument.

Information on ratings for MSG HD and MSG+ HD further suggests that they cannot be described as “must have” programming that would significantly impair any MVPD that did not have access. For a variety of reasons having nothing to do with quality, viewer ratings for MSG HD and MSG+ HD are, like most HD networks, currently far below most well-known SD networks, including but not limited to A&E, ABC, Bravo, CBS, CNN, ESPN, Food Network, Fox,

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<sup>5</sup> Joint Declaration in Support of Program Access and Section 628(b) Complaint (“AT&T Joint Declaration”) at ¶16 (citing CEA Study at 3).

<sup>6</sup> Neither Cablevision’s nor AT&T’s customers can receive DIRECTV’s NFL Sunday Ticket, an optional service of the satellite provider that provides access to the full NFL schedule.

HGTV, Lifetime, MSG, MSG+, NBC, SNY, TNT, USA, and YES.<sup>7</sup> These networks cannot all be considered “must have” or indispensable to an MVPD’s competitive viability, and yet far more consumers watch these channels than MSG HD or MSG+ HD. The most that can be said (and AT&T has not shown even this) is that MSG HD and MSG+ HD are an attractive feature to some subset of the Connecticut customer base. But the same can be said for virtually every single program service included in an MVPD’s line-up; and it cannot be the case that lack of access to any single channel in a distributor’s line-up that is attractive to a subset of viewers impedes an MVPD’s ability to compete.

A second possibility is that while the average value of the HD services is small, the value is large to some consumers. It is certainly true that Cablevision hopes to gain a marketing advantage amongst a group of local sports fans who will regard the availability of MSG HD and MSG+ HD as a selling point in Cablevision’s favor relative to AT&T. But just as the value to Cablevision is incremental, any “harm” to AT&T is also at the margin and there is no evidence of any impairment of AT&T’s competitive viability.

The fact that AT&T may offer a different set of services than Cablevision, possibly at a different price, does not necessarily translate into any loss of consumer welfare, even in the short run. And in the longer run, of course, a Commission decision to compel licensing of MSG HD and MSG+ HD would affect the expectations of all programmers and distributors about Commission regulatory decisions and reduce the incentive to invest in development of new services and service features, not just programming, because of the risk that the Commission will permit free riding.

AT&T’s complaint offers no evidence or theory explaining why, absent MSG HD and MSG+ HD, it cannot offer a competitively attractive and profitable video service to Connecticut viewers. AT&T argues that the Commission considers regional sport network (“RSN”) programming to be “must-have,” and that competition is undermined when MVPDs are not able to carry such

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<sup>7</sup> Defendants’ Answer to Program Access Complaint, Exhibit 3, Levine Declaration ¶ 14.

programming in Connecticut.<sup>8</sup> Whether or not such programming is “must-have,” this argument is irrelevant here because AT&T has a license to carry MSG and MSG+ programming as well as other RSN programming.

The SNL Kagan report “Economics of High Definition Cable Networks” projects that even by 2012 revenue for HD networks will be equal to roughly only 5 percent of the 2007 revenue for basic cable networks.<sup>9</sup> Kagan further states that it will be “challenging” for HD to attract new viewers relative to the same content in SD – an indication that most viewers are choosing whether or not to watch a program based on its content, not on whether it is carried in HD. If that is so, then HD RSN content cannot be “must have” even if the SD RSN carrying the same professional games is considered by some to be “must have.” Of course viewers who are primarily interested in watching a basketball game, say, in HD, but are just as happy to watch the Lakers as the Knicks will also be customers for whom AT&T can compete even if it does not have MSG HD and MSG+ HD. This is not to minimize the value of the MSG properties. Cablevision does assign a significant value to those properties and their transmission rights. The point, rather, is that AT&T can and has been able to compete for cable customers without a government requirement forcing Cablevision to provide MSG HD and MSG+ HD to AT&T.

In principle, AT&T might have provided evidence that an MVPD that cannot offer an HD RSN such as MSG HD or MSG+ HD could not effectively compete. But AT&T offered no such evidence. In fact AT&T has been a successful competitor, and one that provides a considerable amount of sports programming in HD. There is no evidence that its U-verse service in Connecticut will be incrementally unprofitable (given sunk investments already made or

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<sup>8</sup> Complaint at ¶¶ 56-7.

<sup>9</sup> See “SNL Kagan estimates over 71 million HD subscribers by 2012” at [http://www1.snl.com/SNL-Financial/Press\\_Releases/20080324.aspx](http://www1.snl.com/SNL-Financial/Press_Releases/20080324.aspx). Note that this report was released in March 2008, before the financial crisis, and so tends to overstate 2012 projections versus 2007 results.



planned) without MSG HD and MSG+ HD but would be incrementally profitable with those services.

***b. AT&T's Claimed Impact on HD Penetration***

AT&T does claim that the percentage of its subscribers opting for HD service is lower in Connecticut than in U-verse's other service areas ([[begin highly confidential]]

[[end highly confidential]]).<sup>10</sup> However,

AT&T provides no serious empirical analysis and makes no effort to quantify how much, if any, of its reduced HD penetration rate in Connecticut is due to the lack of MSG HD and MSG+ HD. Simply comparing the HD penetration rate in Connecticut to the average across other areas does not actually test the effect of MSG HD and MSG+ HD exclusion. A simple comparison of HD penetration across areas is not meaningful since many factors may affect HD penetration rates, including, for example, pricing, characteristics of the service, marketing effort, demographics, and competitive alternatives (including the SD package that AT&T offers in the market). An adjustment for differences in relevant factors must precede any comparison of the type AT&T puts forward, and any difference must pass the usual tests for statistical and economic significance.

AT&T HD and overall penetration rates surely differ from one region (and locality) to another, but there is more than one possible explanation for variations in penetration rates. The penetration rate, after all, is defined by AT&T as the number of HD subscribers divided by the total number of subscribers. Holding HD sales constant, the more customers who purchase AT&T's SD service the lower the "HD penetration" rate that AT&T will report. Relatively low HD penetration, by this measure, therefore could be explained by higher than average SD penetration, rather than lower than average HD penetration.

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<sup>10</sup> Joint Declaration in Support of Program Access and Section 628(b) Complaint ("Joint Declaration") at ¶¶ 18, 51.

Conspicuously, AT&T does not make the claim that customers in Connecticut are less likely to purchase AT&T's service—only that amongst those who do purchase it the percentage who choose to pay extra for the HD service **[[begin highly confidential]]** **[[end highly confidential]]** is lower than the average elsewhere **[[begin highly confidential]]** **[[end highly confidential]]**. But there is a reason that AT&T has framed its data in terms of a ratio rather than in terms of actual sales – and that is because AT&T actually is more successful in Connecticut in selling its video service, including its HD service, than it is in the rest of the country.

AT&T reports that were its Connecticut HD sales at **[[begin highly confidential]]** **[[end highly confidential]]**, it would have **[[begin highly confidential]]** **[[end highly confidential]]** more HD customers in Connecticut than it does today.<sup>11</sup> This implies that AT&T's current Connecticut subscriber base is **[[begin highly confidential]]** **[[end highly confidential]]** and that its current HD customer base is **[[begin highly confidential]]** **[[end highly confidential]]**. AT&T reports that its U-verse service is available to approximately 370,000 living units in Connecticut.<sup>12</sup> In other words, for every 1,000 living units passed in Connecticut, AT&T has **[[begin highly confidential]]** **[[end highly confidential]]**. Nationally, AT&T reports 1,577,000 customers out of approximately 19 million living units passed.<sup>13</sup> Assuming that nationally **[[begin highly confidential]]** **[[end highly confidential]]** of AT&T customers receive HD, for every 1,000 living units passed nationally AT&T has **[[begin highly confidential]]** **[[end highly confidential]]**.

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<sup>11</sup> Joint Declaration in Support of Program Access and Section 628(b) Complaint ("Joint Declaration") at ¶51.

<sup>12</sup> "AT&T Connecticut Celebrates One-Year Anniversary As Competitive Video Service Provider; Rapid Deployment of AT&T U-Verse Benefits Connecticut Consumers," [http://www.redorbit.com/news/technology/1595757/att\\_connecticut\\_celebrates\\_oneyear\\_anniversary\\_as\\_competitive\\_video\\_service\\_provider/](http://www.redorbit.com/news/technology/1595757/att_connecticut_celebrates_oneyear_anniversary_as_competitive_video_service_provider/).

<sup>13</sup> "U-verse Update: 2Q09," [http://www.att.com/Common/merger/files/pdf/U-verse\\_Update.pdf](http://www.att.com/Common/merger/files/pdf/U-verse_Update.pdf).

[[end highly  
confidential]].

In effect, then, AT&T's own data demonstrate that it enjoys [[begin highly confidential]]

[[end highly confidential]] more overall video sales per living unit passed in Connecticut and [[begin highly confidential]] [[end highly confidential]] more HD sales per living unit passed in the state. This is hardly evidence that AT&T has been badly harmed in Connecticut and that it has been deprived of a "must have" product.

AT&T's only quantitative measure of injury is therefore meaningless. Just looking at AT&T's HD penetration rate in Connecticut does not say anything about its *overall* penetration rate, and AT&T's absolute success is what matters for the viability of the business. Even a statistically significant finding of some properly-measured effect on AT&T would not be sufficient to indicate either the direction or the magnitude of the consumer welfare consequences, and would merely underline the necessity for a consumer welfare measurement.

Furthermore, one of the reasons that AT&T may be doing relatively less well in selling to HD customers in Connecticut than it is doing in terms of overall customer acquisition is Cablevision's aggressive strategy of offering over 60 HD channels free to subscribers, compared to AT&T's requirement that consumers pay a minimum of \$10 more to receive HD. This pro-consumer action by Cablevision would be expected to increase its relative share of customers who upgrade to HD, relative to other markets where AT&T's cable competition may not undertake such a pro-consumer strategy.

**c. AT&T's Claims of Unfair Competition**

AT&T claims that Cablevision/MSG's decision to license some distributors but not to license AT&T qualifies as unfair competition and that an anticompetitive effect can be strongly inferred from Cablevision/MSG's "sacrificing the short-term benefits" of licensing MSG and MSG+ in HD

format to AT&T.<sup>14</sup> In fact, no evidence has been provided that Cablevision/MSG is sacrificing even short-term benefits. The decision not to accept AT&T's offer for the MSG HD and MSG+ HD rights means that Cablevision must live with **[[begin highly confidential]]**

**[[end highly confidential]]**, but Cablevision presumably believes the decision will yield immediate revenue increases because distinguishing itself from competitors will attract additional subscribers, and those additional subscribers will be more profitable to it than **[[begin highly confidential]]**

**[[end highly confidential]]**. No evidence has been provided, and it is facially implausible, that this decision will be profitable for Cablevision/MSG only in the long run by eliminating AT&T and other MVPDs as effective competitors.

AT&T also makes a claim that by denying it access to MSG HD and MSG+ HD Cablevision/MSG is requiring AT&T to engage in two-level entry.<sup>15</sup> But even taking the first level as HD RSNs, AT&T clearly is not foreclosed from competing because it has access to numerous such RSNs – and even with respect to the games specific to MSG, AT&T is not foreclosed because it has access to those games through its license to distribute MSG and MSG+.

AT&T cites Cablevision advertising that tells consumers that some competitors, including AT&T, do not offer MSG HD and MSG+ HD.<sup>16</sup> Even if it is true (as Cablevision hopes) that this difference makes Cablevision more attractive to consumers, it does not address the question of whether AT&T is precluded from providing alternative channel line-ups (and other services) that produce equivalent overall consumer welfare in the marketplace.

In 1992 Congress was concerned that vertically integrated cable operators, then the only distributors of retail "multichannel" video program services ("MVPDs"), would refuse to license programming under their control to direct broadcast satellite ("DBS") providers, the first of

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<sup>14</sup> Complaint at ¶¶62, 70.

<sup>15</sup> Complaint at ¶73.

<sup>16</sup> Complaint at ¶¶62, 70-72.

which were about to launch. The circumstances today are far different. As the D.C. Circuit recently observed in the course of vacating the Commission's cable ownership limit,

[T]he record is replete with evidence of ever increasing competition among video providers: Satellite and fiber optic video providers have entered the market and grown in market share since the Congress passed the 1992 Act, and particularly in recent years. Cable operators, therefore, no longer have the bottleneck power over programming that concerned the Congress in 1992. Second, over the same period there has been a dramatic increase both in the number of cable networks and in the programming available to subscribers. . . . [There is] overwhelming evidence concerning 'the dynamic nature of the communications marketplace' 47 U.S.C § 533(f)(2)(E), and the entry of new competitors at both the programming and the distribution levels . . . .<sup>17</sup>

Today any given viewer can still be reached through the incumbent cable operator. But now the same viewer also can be reached via one (or in some cases two) cable operators, plus the local telephone company and two competing DBS systems (DirecTV and DISH)—bringing the number of competitors to at least four. Online video distribution is growing and wireless (3G and future 4G) distribution of video increasingly offers additional viewer alternatives.<sup>18</sup> In short, the

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<sup>17</sup> Comcast Corporation v. F.C.C., D.C. Circuit No. 08-1114, August 28, 2009 slip op. at 14.

<sup>18</sup> The success of the iPhone, associated exclusively with AT&T 3G wireless service and including video content, is well-known. Verizon also offers wireless mobile video services (V Cast). (See <http://support.vzw.com/faqs/V%20CAST/faq.html#item1>.) YouTube is said to be in negotiations to add subscription-based motion picture content to its service, which is available on the iPhone as well as online. New York Times Online, September 3, 2009 <http://www.nytimes.com/2009/09/03/technology/internet/03tube.html?scp=2&sq=youtube&st=cse> Content providers are supplying increasing quantities of video service online. "More than a dozen TV networks— including broadcaster CBS Corp.— agreed to join Comcast Corp.'s nationwide test of an online-video subscription offering, as companies seek additional revenue streams amid the advertising slump." Nat Worden, TV Networks Join Comcast Web Test, WALL

market in which cable operators compete with other video distribution channels has become at least as competitive in structure as the vast majority of commercial enterprise in the United States.

In summary, AT&T has not shown that Cablevision/MSG's conduct falls within established economic principles condemning anticompetitive behavior, constitutes an unfair method of competition, or hinders significantly AT&T's ability to compete; much less has AT&T demonstrated harm to consumers.

### **3. Consumer Benefits of Exclusivity**

AT&T argues that Cablevision/MSG should be ordered to make its MSG HD and MSG+ HD services available to Cablevision's competitor, AT&T, at a reasonable price, on the grounds that AT&T is otherwise significantly hindered as a competitor. AT&T also claims that Cablevision/MSG's conduct has no efficiency rationale—i.e., that there are no benefits for consumers.

AT&T's complaints notwithstanding, it does not make sense from the perspective of sound economic policy for the Commission to require Cablevision/MSG to make the MSG HD programming services available to Cablevision's competitor, AT&T, at a regulated "reasonable" price. To do so could be anticompetitive (i.e., harmful to consumer welfare) because it would mandate a transaction that might be inefficient at the required price, or possibly at any price. Such a requirement also has the potential to affect pricing, investment, and innovation decisions in video distribution and related businesses.

Requiring firms to engage in such inefficient transactions discourages competition in the important dimension of programming content differentiation among MVPDs and among content providers. Indeed, the discretion to choose one's distribution channels, up to and

including the decision to use a single channel exclusively, usually is pro-competitive because it permits sellers to differentiate their products to make them more attractive to consumers. As discussed above, there is no evidence in this case that Cablevision/MSG's decision to limit distribution has harmed multichannel video competition.

Cablevision/MSG pursues a selective licensing policy with MSG HD and MSG+ HD, offering the service to some distributors (including Cablevision competitors DirecTV and RCN) but not to others. Cablevision's position is that MSG HD and MSG+ HD are not subject to the Cable Act because they are not delivered by satellite; therefore, in principle, they could be sold exclusively through a single distribution channel.<sup>19</sup> Because exclusivity is the most extreme case of selective distribution, we focus here on the analysis of exclusivity in video distribution. If exclusivity is not anticompetitive, *a fortiori* less selective distribution is also benign.

Economists would agree that there are circumstances where exclusivity is inefficient, and most would agree that there are certain circumstances in which exclusivity might have anticompetitive effects, e.g., when it significantly hinders or eliminates competition by denying essential inputs. But exclusive contracts can also be efficient, and even when they are not there are important benefits from having contract terms determined without compulsion on either side. Sellers' ability to enter into exclusive agreements should therefore not be ruled out on a *per se* basis. Rather, in order to avoid harmful deterrence of pro-competitive behavior, exclusivity must be assessed on a case-by-case basis, using the economic and policy tools of antitrust analysis, as we do above.

Competition among sellers—and among buyers—is concerned not just with prices, but with the characteristics and components of products. In essence, the Cable Act limits this form of competition by entities using satellite-delivered content. The possibility of product differentiation in turn gives rise to incentives to innovate and to invest. Finally, an unrestricted right of competitors to share each other's content distorts the incentives of buyers and sellers

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<sup>19</sup> Defendants' Answer to Program Access Complaint at 20-25.

to engage in efficient tradeoffs between vertical integration and external sourcing. For all these reasons, exclusivity in contracting cannot be regarded as generally harmful to competition or consumer welfare.

Exclusivity is a common and efficiency-enhancing feature of many commercial contracts. Exclusivity is particularly common in the sale of intellectual property rights, and is the norm rather than the exception in the sale of video program distribution rights. Exclusivity arises from a competitive market process because it can enable program producers to make their properties more valuable to distributors. This happens because exclusivity makes the incentives of distributors and programmers more compatible, reduces inefficient free riding, and permits economies of scale and specialization in each stage of program production and distribution. It is widely recognized that this brings benefits to consumers.<sup>20</sup> Similar benefits can accrue from a selective licensing strategy, such as Cablevision/MSG's policy with respect to the licensing of MSG HD and MSG+ HD.

Exclusivity, to the extent permitted under the Cable Act, permits MVPDs to compete more vigorously by differentiating their products. Exclusivity can therefore increase both the quantity

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<sup>20</sup> For example, columnist David Pogue writes that "[Y]ou could argue ... that exclusivity arrangements are actually good for innovation." *The Irsome Cell Phone Industry*, THE NEW YORK TIMES, July 23, 2009. The Supreme Court made similar points in supporting AT&T's position in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407-08 (2004) ("Compelling . . . firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities."); *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 428-29 (1999) (Breyer, J., concurring in part and dissenting in part) ("[A] sharing requirement may diminish the original owner's incentive to keep up or to improve the property by depriving the owner of the fruits of value-creating investment, research, or labor."); *id.* at 429 ("Nor can one guarantee that firms will undertake the investment necessary to produce complex technological innovations knowing that any competitive advantage deriving from those innovations will be dissipated by the sharing requirement."); *United States Telecom Ass'n v. FCC*, 290 F.3d 415, 429 (D.C. Cir. 2002) ("[M]andatory unbundling comes at a cost, including disincentives to research and development.").



and quality of video programming (and thus, presumably, the diversity of program content) by increasing incentives to invest in programming. In the case of MSG this could be reflected in further investment in its broadcasts, teams, and facilities that it owns, or in new programming initiatives or distribution of its programming via new technologies. It follows that a ban on exclusive program distribution contracts may reduce output and program quality, injuring consumers. Put the other way around, if there are efficient transactions to be made involving non-exclusive rights, they would likely take place on market-based terms without the use of compulsion. Therefore, the effect of compulsion is likely to be the creation of welfare-reducing transactions.

There are various ways in which exclusive contracts (or differentiated product competition more generally) can benefit consumers. One is that they can promote a wider array of video programming options for consumers. Consider the case where one firm offers an array of programming while another offers the same array plus some exclusives. Consumers are likely to benefit from the competition between these providers as they would effectively have the option of whether or not to pay for the exclusives. Second, markets with differentiated products are more likely to exhibit vigorous price competition than markets with homogeneous products.<sup>21</sup>

Even in a case where it would be more efficient for a given service to be offered by all distributors, it is easy to see how the *requirement* that a vertically integrated firm provide a license at a regulated price can nevertheless be inefficient. Here is an example: Say that MVPD companies *A* and *B* are close competitors. *A* develops a new service which is worth exactly \$5 to every consumer. *A* would efficiently include the service in its own package and offer a license to *B* for \$5 per customer, or perhaps even a somewhat lower price. The ability to effectively earn

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<sup>21</sup> See Alan Beggs and Paul Klemperer, "Multi-Period Competition With Switching Costs", *Econometrica*, Vol. 60 No. 3, pp. 651-66. When firms offer very similar packages the incentive to cut price is reduced because when an initiator reduces prices competitors will have to match, making the price cut less profitable for the initiating firm.

revenues from all of *B*'s customers would in this case be enough to offset the loss of the competitive advantage created by the exclusive. But if regulation were effectively expected to force *A* to license the product at a price of say \$1, then the license would cost *A* its exclusive while at the same time limiting its licensing revenue. In this case its incentive to develop, maintain, and improve its service would be inefficiently limited.

This is in addition to the case where an exclusive might be more efficient, even beyond the issue of seller incentives. Say that the value in the new product is that it will matter greatly to some consumers but not very much to most. In this case consumers are likely to benefit from being able to choose between a service that includes the product and one that does not, rather than two services which both include the product and its cost.

Finally, this analysis is largely independent of whether the seller is vertically integrated with one of the buyers in the market. Vertical integration may cause firms to offer consumers a better deal because each part of the vertical chain will recognize that improving its quality and lowering its price will increase the profitability of its partner, but independent companies also can and do negotiate exclusive contracts. As the D.C. Circuit noted recently, DBS companies have "exclusive arrangements with certain highly sought after programmers."<sup>22</sup>

In fact, exclusive contracts are extremely common in media industries. This phenomenon is not limited to the electronic media. Newspapers often obtain exclusive local rights to op-ed columns and other features such as crossword puzzles. Virtually every contract involving intellectual property distribution rights defines a geographic and temporal dimension in which the distributor has exclusive rights to the property. The effect of this is to enhance the overall economic value of each property by permitting rights holders to tailor marketing and distribution efforts to different categories of consumers. In a competitive context this improves efficiency and increases the output of intellectual property. A single television program or series, for example, generally is sold on an exclusive basis to a broadcast network for a specified

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<sup>22</sup> Comcast v. FCC, *supra* note 17, slip op. at 13.

number of exhibitions (e.g., two) over a specified period (e.g., one year) within a specific area (e.g., the United States). Other rights to the program or series may be retained by the seller or sold in advance on similarly well-defined exclusive bases to others (syndicators, foreign distributors, cable networks, DVD distributors). As the Commission itself recognized in reinstating its rules pertaining to syndicated exclusivity of programs on imported distant signals, output and consumer welfare are enhanced by the exclusivity mechanism.<sup>23</sup>

An example can illustrate the pro-competitive effects of exclusivity in video distribution. One of the means by which the audience share of the original three broadcast networks was reduced was through the entry of several new broadcast networks, of which Fox was the first. Several characteristics of Fox's successful entry are particularly relevant to the present discussion. Fox succeeded even though it had to compete with existing networks whose extremely popular programs were in every case protected by exclusive network broadcast rights. Fox invested in a great deal of its own programming, much of it unique and innovative by previous broadcast network standards. It is noteworthy that it did not occur to the Commission to facilitate Fox's entry by requiring ABC, CBS, and NBC to share with the new entrant all those networks' own program production. Other broadcast networks such as WB, UPN, Paxson, and Univision, have launched without the benefit of access to incumbent exclusive (or even vertically integrated) programming. Like Fox, each of these networks developed its own portfolio of programming and then protected the distribution of that programming through exclusive contractual arrangements. Not all broadcast networks have been financially successful. As with all businesses, many factors influence the success and failure of broadcast networks, but

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<sup>23</sup> See *In the Matter of Amendment of Parts 73 and 76 of the Commission's Rules relating to Program Exclusivity in the Cable and Broadcast Industries, Report and Order*, 3 FCC Rcd 5299, ¶¶ 49-89 (1988) (subsequent history omitted); see also *In the Matter of the Implementation of Sections 12 and 19 of the Cable Television Consumer Development of Competition and Diversity in Video Programming Distribution and Carriage*, MM Docket No. 92-265, First Report and Order, 8 FCC Rcd 3359, ¶ 63 (1993) ("As a general matter, the public interest in exclusivity in the sale of entertainment programming is widely recognized.")

guaranteed access to a competitor's exclusive programming is never cited as one of these factors.

Similarly, what is most instructive about the history of the development of cable television is that once operators began to expand beyond rural areas, they found it necessary to offer a unique set of program options. Operators could not survive simply by duplicating over-the-air options already largely available to viewers, a strategy enabled by Supreme Court copyright decisions. Cable operators and other MVPDs began to offer differentiated products in order to compete successfully for the remaining television households. The 1992 Act reduces the incentive to compete in this way by forcing cable operators to bear the risk and expense of new investments while permitting MVPD competitors to capture a portion of the benefits.

AT&T itself engages in competitive strategies based on selective distribution, for the purpose of differentiating its products, up to and including exclusivity. An example familiar to many cellular phone users is AT&T's agreement with Apple under which the popular iPhone can be used only on the AT&T wireless network.<sup>24</sup> And, like every cable operator, AT&T benefits by its ability to exclude some channels that wish to be included on its service if it is unable to make a satisfactory economic arrangement with the seller.

The practical effect of the current policy, which requires vertically-integrated programmers to make satellite-delivered programming available to MVPD rivals, is to make it cheaper on the margin for non-cable MVPDs to duplicate existing satellite-delivered program options than to develop new ones. Clearly, this acts to discourage an expansion of program supply and

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<sup>24</sup> AT&T alludes to this exclusive arrangement at Complaint ¶ 77, footnote 54. AT&T advertising also states that "iPhone is configured to work only with the wireless services provided by AT&T." See <http://www.wireless.att.com/iphone/>. See, e.g., Leslie Cauley, "AT&T Eager to Wield Its iWeapon," USA Today, May 23, 2007 ("The Apple iPhone . . . could give AT&T, its exclusive U.S. distributor, the ultimate experience for a wireless carrier: an easy way to handcuff rivals and steal customers.") at [http://www.usatoday.com/tech/wireless/2007-05-21-at&t-iphone\\_N.htm](http://www.usatoday.com/tech/wireless/2007-05-21-at&t-iphone_N.htm). See also "Like Apple, TV Explores Must-Have Applications" by Saul Hansell, The New York Times, September 6, 2009.

diversity. Construing the ban narrowly rather than requiring MSG/Cablevision to license its HD programming would tend to lead to increased use of exclusivity and therefore greater product differentiation in MVPD services, and would therefore *increase* beneficial competition in the supply of programming to viewers, providing greater choice. Just as exclusivity enhances competition and choice in broadcasting, so it would among MVPDs, and just as exclusivity rarely if ever causes anticompetitive harms among broadcasters, so too would such adverse outcomes be unlikely among MVPDs.

In considering AT&T's request for a compulsory license, the Commission should be mindful of the adverse effects—in particular, reducing the incentives of all competitors to invest in product improvements now and in the future because of the prospect of free riding by non-innovators.

## **EXHIBIT 2**

Declaration of Steven J. Pontillo

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

In the Matter of	)	
	)	
	)	
AT&T Services, Inc. and Southern New	)	
England Telephone Company d/b/a	)	
AT&T Connecticut,	)	
	)	
Complainants,	)	File No. CSR-8196-P
	)	
v.	)	
	)	
Madison Square Garden, L.P. and	)	
Cablevision Systems Corp.,	)	
	)	
Defendants	)	
	)	

**DECLARATION OF STEVEN J. PONTILLO**

I, Steven J. Pontillo, declare as follows:

1. My title is Senior Vice President, Broadcasting, Information Systems and Technology for Rainbow Media Holdings LLC. My duties include technology development, broadcasting, information technology and facilities across all of Cablevision's Rainbow programming business units. This includes all engineering, operational and business development functions for Rainbow Network Communications (RNC), Cablevision's full-service technical division that provides origination and distribution services to national and regional program services. I have been in my present position for six years, and have worked for Rainbow or Cablevision since 1981.

2. I submit this declaration in response to the program access complaint filed on August 13, 2009 by AT&T Services, Inc. and Southern New England Telephone

Company d/b/a AT&T Connecticut ("AT&T" or "Complainant") against Madison Square Garden, L.P. ("MSG") and Cablevision Systems Corporation pursuant to section 628 of the Communications Act, 47 U.S.C. § 548.

3. In the fall of 1998, Cablevision began carrying MSG HD in 1080i High Definition ("HD") format. It began doing the same for MSG+ HD (then known as Fox Sports Net New York HD, or FSNY HD) in the spring of 1999. At the time each of these offerings was launched, Cablevision was the only distributor willing to devote capital and channel capacity toward carrying MSG HD and MSG+ HD -- and that would remain the case for several years after their inception.

4. Cablevision was a pioneer in HD content distribution. When it commenced offering MSG HD, Cablevision became the first regular provider of high-definition sports content in the country. Cablevision's decision to roll out in 1080i HD format right from the start was remarkable, and reflected Cablevision's desire to provide the best picture quality possible with the available technology and thereby preserve and strengthen its identity as a leading-edge provider of advanced television features and capabilities.

5. Cablevision's decision to begin providing content in 1080i HD long before other MVPDs were offering any HD content at all is consistent with Cablevision's practice of being an "early adopter" of cutting edge technologies to enhance value for consumers and to distinguish its product in the marketplace. For example, in the early 1990s Cablevision was among the first MVPDs to adopt remote control-based pay-per-view program ordering, which did not require consumers to place a telephone call to order an event, and in 1992 it co-produced with NBC the first ever complete coverage of



an Olympic games on a pay-per-view basis with its 1992 Barcelona Summer Games offering. In 2003, Cablevision launched its VOOM HD DBS platform, including VOOM 21, a suite of 21 all-HD programming services—the largest package of HD programming available from any provider at the time.

6. Cablevision was also an early adopter of specialized content offerings such as customized textual and graphic content and of innovative delivery technologies such as two-way interaction and video-on-demand. In 2001, Rainbow Media launched Mag Rack, the first video-on-demand “interactive magazine” that offered hyper-specialized programming about personally relevant subjects - ranging from science, bird watching and wine to photography, weddings and vegetarian cooking. In 2003, Cablevision became the first MVPD in the country—either cable or satellite—to offer video-on-demand content in HD.

7. In 1998, when Cablevision began offering MSG HD, HD was considered a novelty more than a mainstream product, and the vast majority of consumers did not possess HD televisions, which at the time were priced at \$3,000 or more. Even though few Americans had the capability to receive HD service, Cablevision was willing to risk the capital, resources, and bandwidth necessary to deploy HD sports content in order to differentiate its service offering and offer a new viewing experience to its subscribers, predicting at the time of its 1998 rollout that HDTV would become attractive to consumers over time. By rolling out MSG HD in 1998, Cablevision and MSG were investing in the future by differentiating themselves from all other communications services companies.

8. Introducing MSG HD was a capital-intensive project that required the addition of new equipment and new master control and edit facilities at Madison Square Garden. MSG re-designed the lighting and added a new HDTV scoreboard in Madison Square Garden, acquired a full suite of Sony HD broadcast cameras, switcher and tape machines, signal processing and transmission equipment, and acquired National Mobile Television's first high definition truck, which was a state of the art, 53-foot double expando truck custom built for this project, which MSG has twice replaced with upgraded HD production trucks in the years since 1998. Additional investment was also required to develop HD customer premise equipment. Aside from these capital costs, MSG also incurred significant additional production costs.

9. Because HD was a novelty more than a mainstream product demanded by MVPD subscribers at the time that MSG HD was first introduced, Cablevision also viewed its rollout of MSG HD in part as a means of adding value for consumers of its non-cable properties. Among the first recipients of MSG HD in October of 1998 were Madison Square Garden's restaurants and luxury suites (served via an internal building feed) and Cablevision's Nobody Beats The Wiz consumer electronics stores, which stores Cablevision had acquired earlier in 1998. Cablevision subscribers gained access to MSG HD in the months that followed.

10. Cablevision considered its ability to display original HD content on cutting-edge televisions for sale in Nobody Beats The Wiz stores across the New York area to be an excellent opportunity to showcase the end-to-end value proposition that Cablevision could offer: original, top-quality content delivered over a first-rate

broadband network to a state-of-the-art television available at a local Cablevision-owned retail outlet.

11. MSG HD and MSG+ HD are not—and have never been—transmitted to distributors via satellite. In fact, it was precisely *because* of the availability of fully constructed, incrementally cost-free bandwidth on Cablevision's terrestrial facilities that the early rollout of MSG HD and MSG+ HD was even possible—the economic and technical advantages of terrestrial delivery did not merely help to mitigate some of the risk associated with investing in expensive and unproven HD programming, they were in fact what made it possible for Cablevision to roll out HD as early as it did. Initially, the MSG HD signal originated from a control facility located at Madison Square Garden, where it was routed to Madison Square Garden's restaurants and luxury suites and then transmitted via existing fiber to Cablevision's headend facilities in Hicksville, NY. Today, that signal originates from the control facility of Rainbow Network Communications (RNC) in Bethpage, NY, is routed via the same fiber to Madison Square Garden for use in its restaurants and luxury suites, and is transmitted via the same fiber to the Hicksville headend for retransmission to Cablevision subscribers. MSG+ HD has always originated at the RNC control facility and follows the same terrestrial paths as MSG HD.

12. Cablevision's experience in transmitting terrestrially-delivered local services dates back to 1986, when it launched News 12 Long Island as the world's first 24-hour local cable news channel. News 12 has been transmitted via terrestrial facilities from its inception, since the limited geographic market for the service made terrestrial delivery the most efficient means of distributing the service. Cablevision also launched

the MetroChannels in 1998, a terrestrially-delivered suite of three local programming services designed to serve as a video and interactive version of a local newspaper. Until its discontinuance in 2005, Metro utilized Cablevision's fiber optic transport network, which interconnects various system headends serving the tri-state area.

13. While MSG HD and MSG+ HD were launched as terrestrial services, the standard definition MSG and MSG+ have been delivered via satellite. The first event televised over the Madison Square Garden Network was in 1969, and MSG+'s original predecessor, SportsChannel New York, was launched in 1976. Both MSG and SportsChannel New York featured games played by New York area basketball, hockey, and baseball teams and those services established their audience base during the 1970s and 1980s via distribution over cable systems serving communities in New York, northern New Jersey and southern and western Connecticut. At that time, satellite delivery was a more cost-effective and technically efficient means of establishing a regional or national distribution footprint for a cable programmer than the microwave distribution that had previously been utilized in the industry. Fiber delivery was not even an option at the time, as fiber had not yet been built out to the extent necessary. Only later in the 1990s did fiber delivery become a viable alternative for distribution of these services, but migrating the services from satellite delivery would have created a number of issues – including contractual issues with affiliates and the services' commitments with respect to transponder space.

14. Delivery of a 1080i HD signal via satellite at the time that MSG began offering MSG HD would have been prohibitively expensive given the bandwidth requirements of MSG HD. In the 1998-99 timeframe, available satellite transponder

capacity for MSG HD and MSG+ HD was limited, as satellite distribution would have required an entire transponder for the two HD channels. The incursion of these transponder costs would have made no sense as a business matter, since Cablevision had an existing fiber optic network, demand for regional HD sports content was only theoretical at the time and Cablevision was the only distributor seeking to provide the games in HD to subscribers and there was an existing terrestrial network available for use by MSG at no incremental cost.

15. Furthermore, the rollout of MSG HD to Madison Square Garden restaurants and luxury suites, to Nobody Beats The Wiz stores, and to Cablevision subscribers could be completed on Cablevision's existing fiber, with no need for expensive satellite distribution—particularly since no one else was interested in receiving it. In fact, no other MVPD expressed interest in carrying MSG HD for at least five years after its introduction in 1998.

16. The continued use of terrestrial facilities for delivery of MSG HD and MSG+ HD to licensees other than Cablevision has evolved naturally from their origins as terrestrial services provided over a fiber-based network. MSG HD and MSG+ HD are available via a fiber link from a central origination pick-up point where licensees arrange for pick-up of MSG HD and MSG+ HD via terrestrial fiber facilities that connect into the pick-up point. As a result, there are no incremental costs to MSG – licensees must arrange for and pay all costs relating to any such pick-up of MSG HD and MSG+ HD.

17. Terrestrial delivery of MSG HD and MSG+ HD has continued to make financial sense because there is no recurring incremental cost involved with simply maintaining the transmission path that has existed for over a decade, and there is no need

to invest in satellite uplink equipment or to pay monthly transponder charges for the nationwide distribution footprint of satellite carriage for a service that is primarily of regional interest and for which licensees have agreed to incur the costs relating to pick-up at a point designated by MSG. Switching to satellite delivery would add significant unnecessary costs. Other vendors have similarly found terrestrial delivery of bandwidth-intensive HD networks to be more efficient than satellite delivery, even where a sister SD network is already delivered via satellite. For example, SportsNet New York (SNY) is distributed via satellite but SNY HD is distributed terrestrially.

18. Terrestrial delivery of MSG HD and MSG+ HD ensures better picture quality for consumers, as terrestrial delivery does not require extensive compression to remain cost-effective, as does satellite delivery. MSG HD and MSG+ HD run over Cablevision fiber at a minimally compressed rate of 270 Mbps, far higher than practical on satellite, either in 1998 or today. The varied, constant, high-speed action unique to sports is particularly bandwidth-intensive and unfit for substantial compression even when compared to other non-sports HD content.

19. The greater bandwidth that terrestrial delivery makes practically available ensured that the new technical challenges associated with producing and distributing sports content in HD would not be exacerbated by bandwidth constraints. It also allowed for the introduction of technical enhancements and advanced capabilities, including the eventual addition of two-way features, that are not practical in a satellite distribution model. For example, in 2001, Cablevision experimented with a two-way offering known as "Game Director," which offered viewers the opportunity to "choose your own [camera] angle" for certain games. "MSG Game Director" allowed viewers to select the

feeds from any of four cameras during a live game telecast and call up statistics, archived videos, and columns written by MSG on-air talent. In all, Game Director included six separate video streams, which were only possible because of the comparative bandwidth capabilities associated with fiber distribution.

20. Terrestrial delivery of MSG HD and MSG+ HD resulted from a confluence of factors: convenience and cost savings associated with delivery over fiber-based networks, Cablevision's early adoption of HD and its willingness to invest in and carry HD content at a time when other MVPDs were not, Cablevision's and MSG HD and MSG+ HD's regional footprint, the lack of a need for a nationwide distribution footprint provided by satellite, and the higher quality and greater flexibility to add enhancements and two-way features provided by terrestrial delivery. There was—and to this day still is—no viable business case to support satellite delivery of MSG HD and MSG+ HD.

I solemnly affirm under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

Date: 9/16/09

  
\_\_\_\_\_  
Steven J. Pontillo



REDACTED -- FOR PUBLIC INSPECTION

**EXHIBIT 3**

Declaration of Adam K. Levine

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of	)	
	)	
AT&T Services, Inc. and Southern New	)	
England Telephone Company d/b/a	)	
AT&T Connecticut,	)	
	)	
Complainants,	)	File No. CSR-8196-P
	)	
v.	)	
	)	
Madison Square Garden, L.P. and	)	
Cablevision Systems Corp.,	)	
	)	
Defendants	)	
	)	

**DECLARATION OF ADAM LEVINE**

I, Adam K. Levine, declare as follows:

1. My title is Senior Vice President of Legal and Business Affairs – MSG Media. I have been with the company since January 2002. My duties include, among other things, negotiating and documenting affiliation and other agreements relating to Madison Square Garden, L.P.’s cable networks.
2. I submit this declaration in response to the program access complaint filed on August 13, 2009 by AT&T Services, Inc. and Southern New England Telephone Company d/b/a AT&T Connecticut (“AT&T” or “Complainant”) against Madison Square Garden, L.P. (“MSG”) and Cablevision Systems Corporation pursuant to section 628 of the Communications Act, 47 U.S.C. § 548.
3. I have personally participated in licensing discussions with AT&T representatives regarding the satellite-delivered, standard definition (“SD”) MSG and

MSG+ program services (MSG+ was at one time referred to as Fox Sports Net New York (FSNY)) and before that it was known as SportsChannel New York). I have also participated in discussions with AT&T representatives regarding the terrestrially-delivered, high definition ("HD") MSG HD and MSG+ HD program services.

4. MSG HD and MSG+ HD are licensed separately from MSG and MSG+.

5. MSG and MSG+ are currently licensed to, and carried by, AT&T in Connecticut pursuant to an Affiliation Agreement dated October 17, 2007.

6. During the negotiation process relating to the proposed carriage by AT&T of certain Cablevision-affiliated networks, on June 18, 2007 AT&T filed a program access complaint against Cablevision Systems Corporation and Rainbow Media Holdings, LLC regarding a number of Cablevision-affiliated networks, MSG and FSN New York (predecessor to MSG+) among them. A description of the negotiations with AT&T up to that time is contained in a prior declaration included with the Answer filed by Cablevision and Rainbow to AT&T's June 18, 2007 program access complaint. That prior declaration is appended here as Levine Exhibit 1.

7. During those negotiations, but prior to AT&T's filing of its June 18, 2007 program access complaint, I had a telephone conversation with Rob Thun, Vice President of Programming for AT&T, and Tom Rawls, attorney, AT&T. That call took place on June 12, 2007. During that call, I informed Mr. Thun and Mr. Rawls that a license to distribute MSG HD and MSG+ HD would not be part of the deal under discussion. Mr. Rawls responded that AT&T understood that MSG is not legally obligated to license the terrestrially-delivered MSG HD and MSG+ HD to AT&T.

8. Negotiations with AT&T continued in 2007 notwithstanding its program access complaint. When the parties began making progress toward resolving their dispute over AT&T's carriage of the standard definition, satellite-delivered MSG and MSG+ services, the parties negotiated language for a Release that would accompany any settlement of the program access complaint and accompanying Affiliation Agreement. AT&T made another request for a license to distribute the terrestrially-delivered MSG HD and MSG+ HD services in October 2007, but this request was again denied.

9. On October 17, 2007, while AT&T's program access suit was still pending, the parties negotiated a settlement of AT&T's program access complaint that included, among other agreements, the Release and the October 17, 2007 Affiliation Agreement between AT&T and Madison Square Garden, L.P., which licensed AT&T to carry the satellite-delivered MSG and MSG+ services on certain of its cable systems in Connecticut.

10. As noted above, the October 17, 2007 Release was negotiated as part of the settlement of AT&T's program access complaint, and stated that (*inter alia*) "AT&T and Rainbow [defined to include MSG] hereby release one another and the other's respective successors and assigns from any and all claims, actions, damages, and liabilities arising out of or related to the issues in [AT&T's program access complaint] and the negotiation of the Agreement (including, without limitation, the terms, conditions, and provisions contained therein or that could have been contained therein) . . . ." AT&T made no effort to exclude from coverage by the release any item or matter discussed during the course of the just-concluded license negotiations, including the discussions regarding MSG HD and MSG+ HD.

11. In mid-2008, AT&T began requesting access to "Rainbow HD" networks. AT&T and Rainbow had previously entered into license agreements relating to the satellite-delivered, standard-definition AMC, IFC, WEtv and fuse services. Mr. Rawls forwarded an E-mail to me dated July 31, 2008 in which he stated that AT&T was "requesting an amendment to our existing agreements that provides us the right to carry each of your HD simulcasts for AMC, IFC, We and fuse." I spoke with Mr. Rawls that same day, and he asked me if I could help him with "getting access to the satellite delivered HD simulcasts" for AT&T. He specifically said that AT&T's focus was "not the terrestrial stuff," a statement that was consistent with Mr. Rawls' prior acknowledgement to me, described above, that MSG had no legal obligation to license the terrestrially-delivered MSG HD and MSG+ HD to AT&T. At no time during any of the negotiations or discussions with AT&T did AT&T at any time indicate that MSG's decision not to license AT&T MSG HD and MSG+ HD would hinder its ability to compete in any respect.

12. As the negotiations relating to the satellite-delivered AMC HD, IFC HD, WEtv HD, and fuse HD continued, Rainbow offered to provide those satellite-delivered national HD networks to AT&T in exchange for **[[begin highly confidential]]**

**[[end highly confidential]]** AT&T rejected this proposal, but did state that it would consider **[[begin highly confidential]]**

**[[end highly confidential]]** if

it could distribute MSG HD and MSG+ HD, in addition to AMC HD, IFC HD, WEtv HD, and fuse HD. AT&T's counterproposal was a non-starter, since it had previously been made clear to AT&T that MSG would not provide AT&T with a license to carry MSG HD and MSG+ HD. Discussions regarding a potential license for AMC HD, IFC HD, WEtv HD, and fuse HD continued, but the parties have been unable to agree on terms to date.

13. The satellite-delivered MSG and MSG+ services are separately licensed from the terrestrially-delivered MSG HD and MSG+ HD services, the underlying content shown on the terrestrially-delivered MSG HD and MSG+ HD services will not necessarily always be the same as that found on the satellite-delivered SD MSG and MSG+ services, and the satellite-delivered MSG and MSG+ services are subject to different carriage arrangements from the terrestrially-delivered MSG HD and MSG+ HD services. For example, MSG HD and MSG+ HD are carried on a different level of service than MSG and MSG+, they are delivered via a separate and distinct delivery method, occupy distinct channel locations and their own separate swath of bandwidth, are processed by different signal reception equipment at MVPD headends, and each provide their respective MVPD affiliates with separate local advertising availabilities. AT&T itself separately denotes HD channels in its lineup, and I understand that AT&T charges subscribers an additional fee for access to the non-broadcast HD services it offers U-Verse TV subscribers in Connecticut.

14. I have reviewed reliable audience measurement data commonly relied upon in the television industry that confirms that viewer ratings for MSG HD and MSG+ HD are, like most HD networks, currently far below most well-known SD networks, including but

REDACTED -- FOR PUBLIC INSPECTION

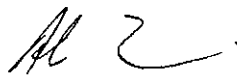
not limited to A&E, ABC, Bravo, CBS, CNN, ESPN, Food Network, Fox, HGTV, Lifetime, MSG, MSG+, NBC, SNY, TNT, USA, and YES.

1 REDACTED -- FOR PUBLIC INSPECTION

I solemnly affirm under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

Date:

9/17/09



Adam K. Levine



REDACTED -- FOR PUBLIC INSPECTION

**EXHIBIT 4**

Release Agreement between  
AT&T Services, Inc. and Madison Square Garden, L.P.  
October 17, 2007

REDACTED -- FOR PUBLIC INSPECTION

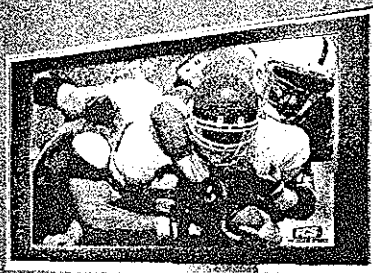
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**REDACTED -- FOR PUBLIC INSPECTION**

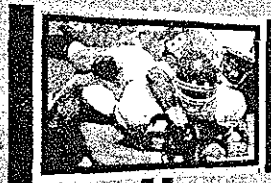
**[[end highly confidential]]**

## **EXHIBIT 5**

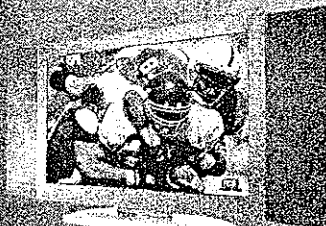
Examples of AT&T Advertising and Marketing Materials



Living Room



Bedroom



Den

## TOTAL HOME DVR

### Any Show. Any Room. Any Time.

AT&T and Microsoft announce a breakthrough in TV—Total Home DVR.

As an AT&T U-verse customer, you'll be able to watch what you want when you want and where you want with Total Home DVR.

Record shows on one DVR and play them back on any TV in your home.

Pause a recorded show in one room and continue watching in another.

Get ready to change the way you watch TV with AT&T U-verse.

Feature available only with U-verse. Geographic and service restrictions apply. Total Home DVR is available in certain markets and expected to be available in all U-verse markets by end of year 2005.

Call or visit [uverse.att.com](http://uverse.att.com) to see if you qualify.

Visit [att.com/totalhomedvr](http://att.com/totalhomedvr)



Advanced TV powered by Advanced Technology

DVR playback available on up to 8 TVs. Total Home DVR feature requires additional receivers for each additional TV. ©2004 AT&T Intellectual Property. All rights reserved. AT&T, the AT&T logo, and all other marks contained herein are trademarks of AT&T Intellectual Property and/or AT&T affiliated companies. All other marks contained herein are the property of their respective owners. The Fox College Sports name and logos are trademarks of 20th Century Fox and its related entities. All rights reserved.

AD CODE: ATTTL-33851

SOURCE: Wall Street Journal-SEP 23 08

Advance your TV with AT&T Universe.  
Introducing Total Home DVR.

Figure 1. The effect of the concentration of the *Agrobacterium* suspension on the transformation efficiency of *Agrobacterium* strains.

\$30

230

530

The new  at&t  
Your world. Delivered.

[illegible]

AD CODE: ATTTL-34304  
SOURCE: Hartford Courant-OCT 19 08

# Record on one DVR. Play on any TV in your home.

Advance your TV with AT&T U-verse.  
Introducing Total Home DVR.

Can you do this with one DVR?	AT&T U-verse	Comcast
Record on one DVR and play on any TV in your home.	Yes	No
Record two shows at once on a single DVR.	Yes	No
Pause your recorded show in one room and pick it up in another.	Yes	No
Watch the same recorded show at the same time on multiple TVs.	Yes	No
More hours of HD DVR storage.	Yes	No

U-verse TV  
with Total Home DVR feature

\$30  
per month

U-verse High Speed Internet

\$30

U-verse Voice  
Digital Voice Phone

\$30

The new  at&t  
Your world. Delivered.

CALL TODAY OR VISIT AN AT&T STORE / 1-800-PICK-AT&T / ATT.COM/VERSETV

\*Total Home DVR feature available for up to 8 TVs and requires extra receivers for each additional TV at \$5 per month. Four shows can be recorded to the DVR at viewers' discretion only, up to four can be HD, subject to availability. Offer ends 1/31/04. Available only to new residential U-verse subscribers who purchase AT&T U-verse TV. Excludes programming. AT&T U-verse High Speed Internet, U-verse Voice (included on all U-verse TV service), monthly credit of \$10 applied to U-verse TV plan for 12 months of service. After 12 months, or if any qualifying services are discontinued, non-discounted rates will apply. First 3 months of qualifying services for customers on credit. Taxes and other charges apply. AT&T U-verse: World's Best Customer Service. Price, time and location subject to change without notice. Credit and other restrictions apply. ©2004 AT&T Intellectual Property. All rights reserved. AT&T, the AT&T logo, and all other AT&T marks contained herein are trademarks of AT&T Intellectual Property and/or AT&T affiliated companies. All other marks contained herein are the property of their respective owners.

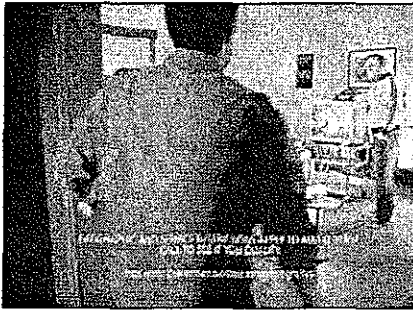
AD CODE: ATTTL-34444  
SOURCE: Hartford Courant-OCT 26 08



# Competitrack

Advertiser: AT&T  
Product: AT&T U-verse  
Title: Portable Drag(L/A,\$200 Cash Back)  
Ad Code: ATTTL-36681

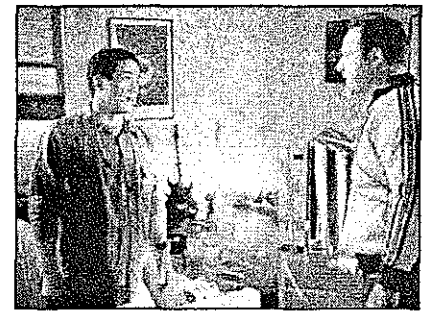
First Date: 02/02/09  
Source: Hartford & New Haven  
Length: 60  
New/Recut: Recut



1st MAN(entering room): So I was thinking maybe we should, what's this?  
Text: GEOGRAPHIC AND SERVICE RESTRICTIONS APPLY TO AT&T U-VERSE. CALL TO SEE IF YOU QUALIFY  
Total Home DVR feature available for up to eight TVs.



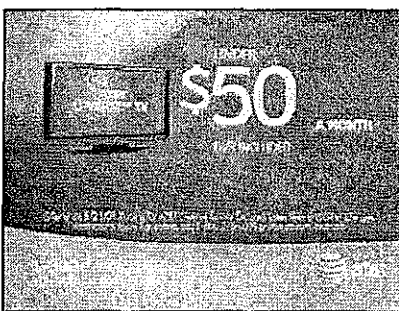
2nd MAN: Well I wanted to watch my recorded shows in any room in my home so I made this little baby as a work around.



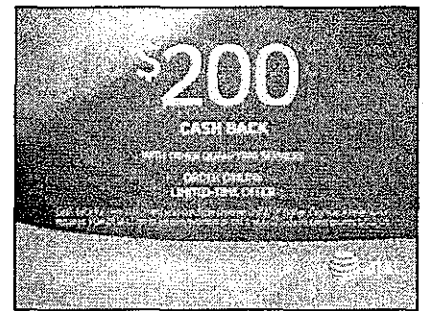
1st MAN: Just get A&T U-Verse TV. The Total Home DVR lets you do all that without all this.  
2nd MAN: This is more fun.



You want to watch it in my room?  
1st MAN: Yeah, maybe. Hey, hey! Whoa! I'm okay.  
(Music)

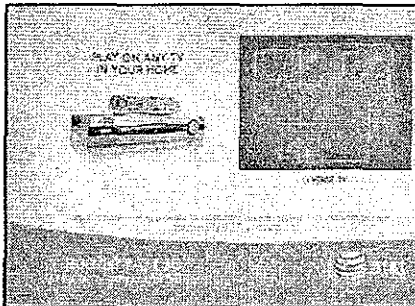


VOICE OVER: New AT&T U-Verse TV. You've never seen anything like it. Call now to get U-Verse TV with DVR included for under \$50 a month.  
Text: Offer ends 5/23/09. Price is for AT&T U-verse Family. Excludes taxes, fees and other charges.



Plus get up to \$200 cash back with qualifying services by ordering online.

Text: Cash back for new customers who purchase U-verse U-200 or higher. Cash back redemption required.



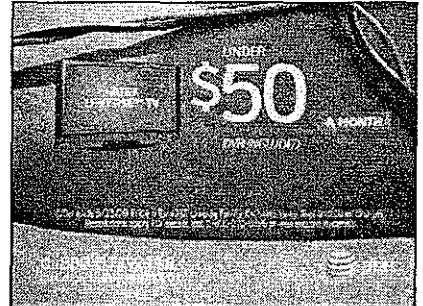
Only AT&T U-Verse lets you record up to 4 shows at once on a single DVR and play on any TV in your home.

Text: Four channels can be recorded to the DVR or viewed simultaneously, up to (illegible) can be HD. subject to availability.

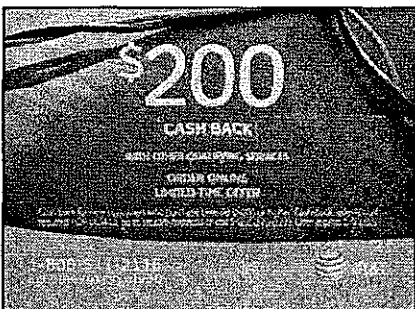


2nd MAN: I could use a drink. You want a drink?  
1st MAN: Yeah.  
2nd MAN: Okay.

Text: att.com/uversetv50

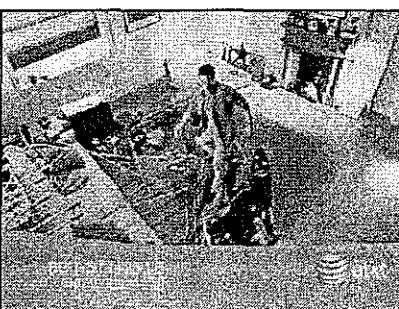


1st MAN: You've got to be kidding man.  
V.O.: Call now to get AT&T U-Verse TV with DVR included for under \$50 a month.  
Text cont.: Restrictions apply for details call (illegible) or visit att.com/tvdetails.

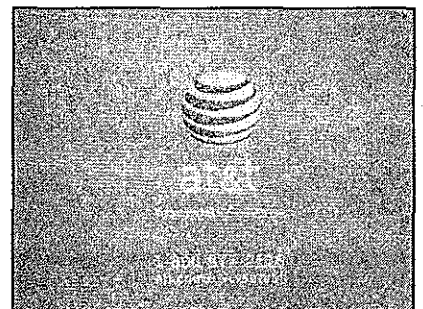


And get up to \$200 cash back with qualifying services by ordering online.

Text cont.: FOR DETAILS go to att.com/tvdetails or call (illegible). Offer expires (illegible).



2nd MAN: Hey can I get some slack!  
1st MAN: You're amazing.



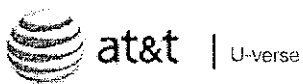
V.O.: The new AT&T. Your world, delivered.  
(Fade out)

Text: Your world. Delivered.  
att.com/uversetv50

- Tapes and MPEGs can be ordered by contacting us at 718.482.4211 -

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- No cable company comes close to matching our DVR functionality!
- Now with access to 110 HD channels and growing!

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[View the U-verse demo](#)

AT&T U-verse  
Total Home DVR

**WHY SWITCH TO AT&T U-VERSE**

### Television

Enjoy a crystal clear picture along with our exclusive Total Home DVR, Picture-in-Picture channel browsing, Video on Demand, choice programming, and access to 110 HD channels and growing! Retire cable. The future is here.

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Full speed ahead! Get the speed you need at a price you want, plus Wi-Fi access, a wireless router and wireless home networking service. Does cable give you all that?

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AT&T U-verse Voice digital home phone service delivers extraordinary value, dynamic voice mail, and powerful features that let you be in control.

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### Check out the latest TV shows

Check out the latest TV shows, the coolest programming, and what Video on Demand has to offer.

[U-Connect](#)

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[Full-color fact-packed Guide](#)

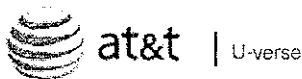
[Blog for all things U-verse](#)

Connecting your Hardware

[About AT&T](#) | [Find a Store](#) | [Contact Us](#) | [Careers](#)

Geographic and service restrictions apply to AT&T U-verse(SM) services. Check to see if you qualify.

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Television : High Speed Internet : Voice : More Resources

Feature Overview

Total Home DVR

U-verse Applications

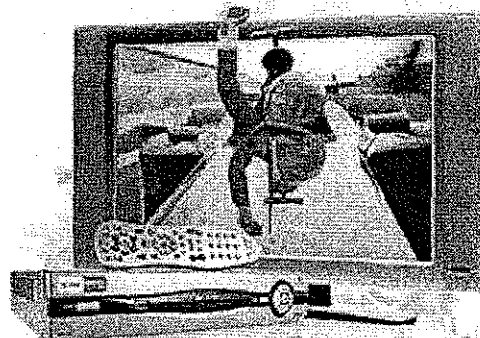
Channel Line-up

## AT&T U-verse TV

welcome to the  
evolution of TV  
programming

Enjoy 100% digital picture and sound that means your digital TV transition is done. Also enjoy digital video recording (DVR), Video on Demand, access to 110 High Definition channels\*, and growing, and choice programming—all at a competitive price!

[View Channel Line-up](#)



### AT&T U-verse TV is Advanced TV

- Choose from a selection of programming packages or customize your own. TV packages start at \$49 per month.
- With up to 390 channels, includes local.
- Access to 110 HD programming channels and growing! [Learn More](#)
- Tune to 1 channel and watch 4 shows at once with AT&T U-verse TV Multiview! [Learn More](#)
- All receivers are digital and ready for high definition TV (HDTV) programming that will deliver a brilliant picture. [Learn More](#)
- All packages include 1 receiver at no additional charge.
- Most packages, the included receiver is a Digital Video Recorder (DVR) with Total Home DVR Service.
- No contract term required.
- Professional installation of your TV and wireless home networking included. Note: Installations may take up to 4-6 hours.
- Extensive home theatre, TV, and speaker installation options available through AT&T ConnectTech(SM) service. [Learn more](#)
- Cutting edge applications that deliver enhanced, interactive content to your TV screen! [Learn more](#)

\* A monthly \$10 HD Technology Fee applies for access to HD service. HD Premium Tier available for an additional \$5 per month and requires subscription to HD service.

### The AT&T U-verse Receiver

Determine your own instant replays, pause your TV show to refill your popcorn, or go out to dinner with your family while you recorded. Then watch it in any room you choose.



**Total Home DVR. Exclusively from AT&T!** It's the only DVR of its kind and is included at no extra charge. Record up to four shows at once on a single DVR and play back on any TV in your home\*. Plus, it



in one room and pick it up in another. No cable company comes close to matching Total Home D

#### More Receiver Features:

- Program your Digital Video Recorder (DVR) remotely from any PC and most wireless phones with internet access.<sup>1</sup>  
**iPhone™ Users** Program your U-verse TV DVR using your AT&T Mobile Remote Access App for the iPhone available or

- Store up to 233 hours of SD or 65 hours of HD shows<sup>2</sup>
- Access to your Video on Demand library anytime and in any room
- On-screen program guide with 14-day look ahead
- On-screen parental control

\* Four channels can be recorded to the DVR or viewed simultaneously, up to 2 can be HD based on geographic restrictions. Full Total Home DVR functionality req TV at \$7 each per month. <sup>1</sup> Remote access requires AT&T High Speed Internet account. Wireless remote access requires WAP 2.0-compliant cell phone or other I storage capacity available only when ordering new U450 TV or HD Technology Fee. DVR with 133 hours of SD or 37 hours of HD storage capacity furnished other

#### Learn more:

- View a U-verse demo
- Learn how U-verse works
- U-verse Hardware
- Upgrade to the U-verse Easy Find Remote Control
- User Guides
- Parental Controls (PDF format†)
- AT&T U-verse TV User Guide (PDF format†)
- Learn about our basic TV package

†  PDF format requires Adobe® Acrobat Reader, available free.

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Geographic and service restrictions apply to AT&T U-verse(SM) services. Check to see if you qualify.

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## FEATURES

## EQUIPMENT

## CHANNELS

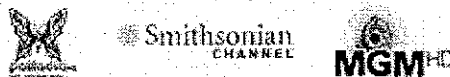
## What to watch

AT&T U-verse offers one of the best values in the industry for access to HD programming and delivers more HD channels than cable. Super high quality HD signals are available through every AT&T U-verse receiver in your home. Don't forget all receivers including the Total Home DVR support playback in both HD and SD.

With AT&T U-verse's HD Technology Service, you get access to over 110 HD channels!



Add the HD Premium Tier for just \$5 more per month!



Subscription to an AT&T U-verse programming package and an HDTV required for optimized HD viewing experience. Access to HD programming requires a \$10 monthly HD Technology fee. HD Premium Tier available for an additional \$5/month and requires a subscription to HD service for \$10/month. HD channel availability varies by package(s) selected. Pricing excludes taxes, fees, and other charges including city video cost-recovery fees where applicable. Pricing, offers and channel and programming availability subject to change without notice. SHOWTIME, THE MOVIE CHANNEL, FLIX and related marks are trademarks of Showtime Networks Inc., a CBS Company. You must subscribe to SHOWTIME to get SHOWTIME ON DEMAND, THE MOVIE CHANNEL ON DEMAND and FLIX ON DEMAND. Showtime Networks, Inc. reserves the right to change programs or scheduled times due to circumstances beyond our control or the opportunity to offer a program of greater interest. HBO® and related channels and service marks are the property of Home Box Office, Inc.

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Why switch to AT&T U-verse

[U-verse Bandwidth](#)[IPTV Technology](#)[Fiber Technology](#)

## Why switch to AT&T U-verse

### New choice. Advanced TV. Great price.

- Does your provider include an HD-ready receiver with a DVR that records up to four programs at once? Our new, EXCLUSIVE Total Home DVR does this and more!
- Can you program your DVR from anywhere using your PC or most wireless phones with Internet access? With U-verse, you get on-the-go access via your phone or a PC.
- Does your provider offer access to 110 HD channels...and growing? Add HD service for a brilliant picture and access to our exceptional HD lineup!
- Does your provider include wireless home networking and professional installation at no charge? Sign up, sit back, and relax. We've got you covered. Our professionals will even show you how to use your new equipment and service!
- Can you get your home phone and wireless messages in one voice mailbox, accessible from any phone line or PC? With AT&T U-verse Voice, you get EXCLUSIVE, powerful features like this and many more, at no extra charge.
- Do your TV, Internet, Home Phone service, and Wireless calling all work together? (Are they all on one bill?) U-verse brings your digital home phone service, Internet, and TV all together to deliver innovative new features you can only get here. Switch today and get a better value!

### Did we forget to mention:

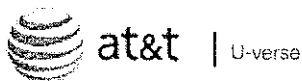
- Our 30-day money-back guarantee
- No contract term is required
- Change channels **without** the blink of an eye
- Our amazing interactive TV features: Sports, weather, stocks and traffic reports on your TV screen, Weather on Demand, View photos from your free Flickr™ account on your TV screen, Picture-in-Picture channel browsing, customize your TV guide with the channels you want to watch—no more scrolling, and more
- Our great Video On Demand (VOD) library with Search capability: Some movies are available on demand the same day they're released on DVD,

Free movie previews to watch before you rent, many free on-demand children's shows

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Television · High Speed Internet · Voice · More Resources

Feature Overview

Total Home DVR

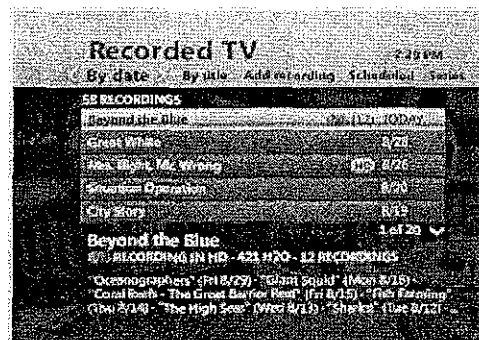
U-verse Applications

Channel Line-up

## Top 10 Reasons AT&T U-verse is Cooler Than Cable

### 1. Total Home DVR

Along with the cool features you normally get with a DVR, like the ability to schedule recordings and pause live TV, our Total Home DVR gives you advanced features like the ability to: Record up to four shows at once on a single DVR; Pause your recorded show in one room and pick it up in another; Record and play back your shows in any room from a single DVR. Best of all -- it's included in most packages at no additional cost to you.



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### 2. More HD channels than most local cable providers currently offer

U-verse HD technology delivers rich, realistic video and 5.1 channel audio with a wide selection of HD channels. U-verse TV also features a robust channel lineup and a large library of Video On Demand titles for viewers of all ages.

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### 3. AT&T U-verse TV Multiview

Multiview service lets you watch several channels at once all on your TV screen and is available for a variety of channels by sports, news and kids programming genres. You can view up to four channels at one time on your U-verse TV screen and select which channel is the main picture with audio. Instead of browsing through the program guide or surfing one channel at a time, customers can tune to a single channel to see All Sports (channel 601), All News (channel 201) and All Kids (channel 301) programming.







AT&T also seasonally offers a Multiview service for subscribers of ESPN GamePlan and ESPN Elite.

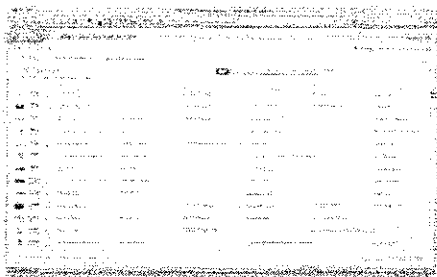
COURT for the channels included in those subscription sports packages

See AT&T U-verse TV for the channels included in these subscription sports packages.

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#### 4. AT&T Yahoo! Web and Mobile Remote Access to DVR

With U-verse TV and Internet, you can schedule DVR recordings even when you're on the go from any Internet-connected computer or compatible wireless device. And you can record up to four shows at once – something no other provider offers today.



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#### 5. Built-in Picture-in-Picture



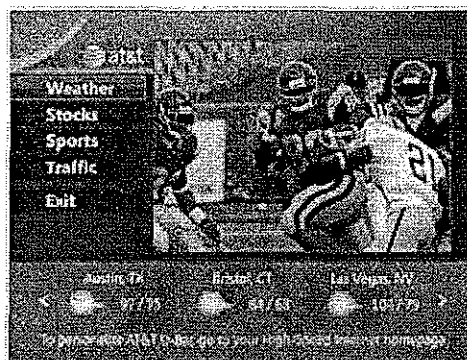
You can channel surf without missing a minute of the program you're watching by using the Picture-in-Picture browse feature.

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#### 6. AT&T U-bar

The U-bar allows you to access customizable stock, weather, sports and traffic information on your TV screen, based on the preferences you set on the AT&T High Speed Internet portal.\*

\*Requires AT&T U-verse High Speed Internet.



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#### 7. Weather On Demand

U-verse TV customers can now check out the weather conditions when they want to see it.\*

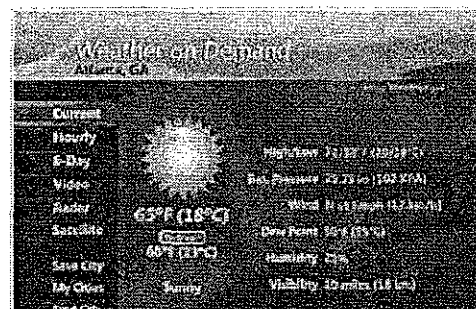
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\*Requires AT&T U-verse High Speed Internet.



  
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## 8. Seasonal Applications



Get fun and informative seasonal interactive applications including TV Awards and New Shows, Yahoo! Sports Fantasy Football, Masters coverage, Olympics coverage, Film Awards Interactive and more! Many with complimentary online and mobile interfaces.\*

\*Online features require AT&T U-verse High Speed Internet.

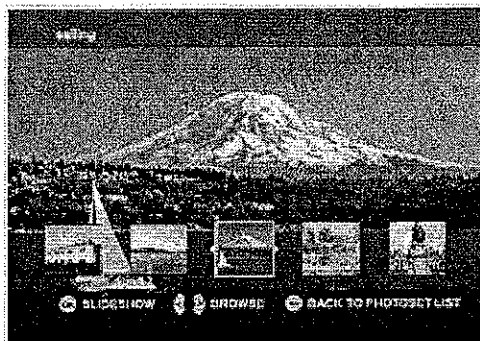
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## 9. Advanced search functionality

U-verse TV has a unique search capability that allows you to search programs or the VOD library by title or an actor's name.

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## 10. AT&T Online Photos from Flickr



You can simply and conveniently watch slideshows and browse your online photos right from the comfort of your couch, on your U-verse TV screen.\*

\*Requires AT&T U-verse High Speed Internet.

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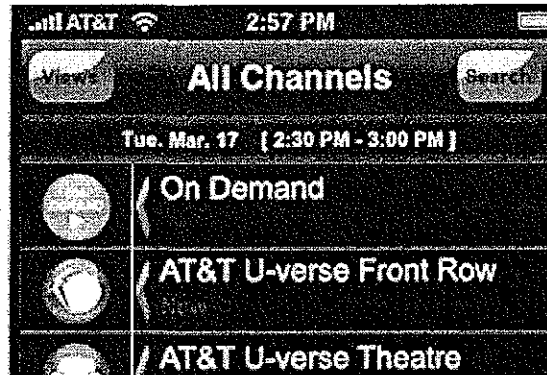
Total Home DVR

AT&amp;T Web Remote Access

AT&amp;T Mobile Remote Access

U-verse TV Mobile Remote Access app for iPhone

## U-verse TV Mobile Remote Access App for the iPhone



**Program your U-verse TV Total Home DVR with the Mobile Remote Access App for the iPhone!**

With the Mobile Remote Access App, you can:

- View list of currently recorded shows
- View list of currently scheduled recordings
- Set your DVR to record a show or series
- View programming information
- Search for shows in the guide
- And much more!

Download it for free today from the App Store<sup>SM</sup>!

**U-verse Members click here to learn more.**

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DetailsDetails

## U-verse TV Mobile Remote Access App for the iPhone™

**U-verse TV Mobile Remote Access App for the iPhone™**

With the Mobile Remote Access App for the iPhone, U-verse TV members can access their DVR and manage their recordings, view upcoming shows, search for programs and more!



Program your U-verse TV Total Home DVR with the Mobile Remote Access App for the iPhone™!

**With the Mobile Remote Access App, you can:**

- View list of currently recorded shows
- View list of currently scheduled recordings
- Set your DVR to record a show or series
- View programming information
- Search for shows in the guide
- And much more!

**Download it for free today from the App Store !**

U-verse Members [click here](#) to learn more.

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- [On Demand](#)
- [Pay Per View](#)

- [AT&T U-verse Demo](#)
- [U-talk Forums](#)
- [Using Your 3-Screen DVR](#)
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
## EXHIBIT 6

### AT&T U-verse TV Channel Lineup for Bridgeport, Connecticut<sup>1/</sup>


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<sup>1/</sup> AT&T U-verse TV Channel Lineup for ZIP Code 06604, *at* <http://www.att.com/u-verse/shop/channel-lineup.jsp?wtSlotClick=1-0029OS-0-1&WT.svl=calltoaction> (last visited Sept. 17, 2009).



 Close Window

## U-verse Channel Line-up

Print This Page 

Channel	Channel Name	Category	HD	U450	U300	U200	U100	U-family
840	5StarMAX	Premium		✓				
1840	5StarMax HD	Premium	✓	✓				
166	A&E	General		✓	✓	✓	✓	
1166	A&E HD	General	✓	✓	✓	✓	✓	
178	ABC Family Channel	General		✓	✓	✓	✓	
1178	ABC Family Channel HD	General	✓	✓	✓	✓	✓	
243	ABC News Now	News		✓	✓	✓	✓	
836	ActionMAX	Premium		✓				
837	ActionMAX - West	General		✓				
1836	ActionMax HD	Premium	✓	✓				
1837	ActionMAX HD - West	Premium	✓	✓				
795	AMC	Movies		✓	✓	✓	✓	
252	Animal Planet	Educational		✓	✓	✓	✓	✓
1252	Animal Planet HD	Educational	✓	✓	✓	✓	✓	✓
3732	Arabic Radio & Television	General						
1000	AT&T U-verse Buzz	Private Access		✓	✓	✓	✓	✓
1300	AT&T U-verse Buzz	Private Access		✓	✓	✓	✓	✓
300	AT&T U-verse Buzz	Private Access		✓	✓	✓	✓	✓
100	AT&T U-verse Front Row	Private Access		✓	✓	✓	✓	✓
84	AT&T U-verse Shopping 1	General		✓	✓	✓	✓	✓
198	AT&T U-verse Shopping 2	General		✓	✓	✓	✓	✓
429	AT&T U-verse Shopping 2	General		✓	✓	✓	✓	✓
1600	AT&T U-verse Sports	General		✓	✓	✓	✓	✓
600	AT&T U-verse Sports	General		✓	✓	✓	✓	✓
846	ATMAX	Premium		✓				
1846	ATMax HD	Premium	✓	✓				
188	BBC America	General		✓	✓	✓		
155	BET (Black Entertainment Television)	General		✓	✓	✓	✓	

Channel	Channel Name	Category	HD	U450	U300	U200	U100	U-family
516	BET Gospel	General		✓	✓			
515	BET J	General		✓	✓			
650	Big Ten Network	Sports		✓	✓	✓	✓	
1650	Big Ten Network HD	Sports	✓	✓	✓	✓	✓	
272	BIO	Educational		✓	✓	✓		
222	Bloomberg Television	News		✓	✓	✓		✓
327	Boomerang	General		✓	✓	✓		✓
3053	Boomerang en Espanol	General						
181	Bravo	General		✓	✓	✓	✓	
1181	Bravo HD	General	✓	✓	✓	✓	✓	
567	BYU	General		✓	✓	✓	✓	✓
230	C-SPAN	General		✓	✓	✓	✓	✓
231	C-SPAN2	General		✓	✓	✓	✓	✓
232	C-SPAN3	General		✓	✓	✓		✓
325	Cartoon Network	General		✓	✓	✓	✓	
326	Cartoon Network - West	General		✓	✓	✓	✓	
3603	CCTV-4	General						
3602	CCTV-9	General		✓	✓	✓		
3882	Channel One Russia	Premium						
153	Chiller	General		✓	✓	✓		
3402	Cinelatino	General						
832	Cinemax	Premium		✓				
833	Cinemax - West	Premium		✓				
1832	Cinemax HD	Premium	✓	✓				
1833	Cinemax HD - West	Premium	✓	✓				
525	CMT (Country Music Television)	General		✓	✓	✓	✓	
1525	CMT (Country Music Television) HD	General	✓	✓	✓	✓	✓	
527	CMT Pure Country	General		✓	✓			
216	CNBC	News		✓	✓	✓	✓	✓

Channel	Channel Name	Category	HD	U450	U300	U200	U100	U-family
1216	CNBC HD	News	✓	✓	✓	✓	✓	✓
217	CNBC World	News		✓	✓			
202	CNN (Cable News Network)	News		✓	✓	✓	✓	
3202	CNN en Espanol	News						
1202	CNN HD	News	✓	✓	✓	✓	✓	
203	CNN Headline News	News		✓	✓	✓	✓	
205	CNNI (CNN International)	News		✓	✓			
767	Comcast SportsNet California	Sports		✓				
140	Comedy Central	General		✓	✓	✓	✓	
1140	Comedy Central HD	General	✓	✓	✓	✓	✓	
163	Crime & Investigation Network	General		✓	✓	✓		
3604	CTI-Zhong Tian	General						
189	Current TV	General		✓	✓	✓		
1100	Customer Notification	Private Access		✓	✓	✓	✓	✓
2500	Customer Notification	Private Access		✓	✓	✓	✓	✓
400	Customer Notification	Private Access		✓	✓	✓	✓	✓
563	Daystar	General		✓	✓	✓	✓	✓
3404	De Pelicula	General						
3405	De Pelicula Clasico	General						
120	Discovery Channel	Educational		✓	✓	✓	✓	
1120	Discovery Channel HD	Educational	✓	✓	✓	✓	✓	
3102	Discovery en Espanol	Educational						
3103	Discovery Familia	Educational						
256	Discovery Health	Educational		✓	✓	✓		
335	Discovery Kids	Educational		✓	✓	✓		✓
302	Disney Channel	General		✓	✓	✓	✓	✓
1302	Disney Channel HD	General	✓	✓	✓	✓	✓	✓
304	Disney XD	General		✓	✓	✓	✓	✓
3052	Disney XD en Espanol	General						

Channel	Channel Name	Category	HD	U450	U300	U200	U100	U-family
1304	Disney XD HD	General	✓	✓	✓	✓	✓	✓
454	DIY Network (Do-It-Yourself Network)	General		✓	✓	✓		✓
1134	E! Entertainment HD	General	✓	✓	✓	✓	✓	
134	E! Entertainment Television	General		✓	✓	✓	✓	
932	Encore	Premium		✓	✓			
933	Encore - West	Premium		✓	✓			
938	Encore Action	Premium		✓	✓			
942	Encore Drama	Premium		✓	✓			
1932	Encore HD	Premium	✓	✓	✓			
934	Encore Love	Premium		✓	✓			
936	Encore Mystery	Premium		✓	✓			
944	Encore Wam	Premium		✓	✓			
940	Encore Westerns	Premium		✓	✓			
602	ESPN	Sports		✓	✓	✓	✓	
610	ESPN Alternate 1	General		✓	✓	✓	✓	
611	ESPN Alternate 2	General		✓	✓	✓	✓	
612	ESPN Alternate 3	Sports		✓	✓	✓	✓	
613	ESPN Alternate 4	General		✓	✓	✓	✓	
603	ESPN Classic	Sports		✓	✓	✓	✓	
3302	ESPN Deportes	Sports		✓				
4401	ESPN GamePlan 1	General						
4402	ESPN GamePlan 2	General						
4403	ESPN GamePlan 3	Sports						
4404	ESPN GamePlan 4	Sports						
4405	ESPN GamePlan 5	Sports						
4406	ESPN GamePlan 6	Sports						
1602	ESPN HD	Sports	✓	✓	✓	✓	✓	
606	ESPN2	Sports		✓	✓	✓	✓	
614	ESPN2 Alternate 1	Sports		✓	✓	✓	✓	

Channel	Channel Name	Category	HD	U450	U300	U200	U100	U-family
615	ESPN2 Alternate 2	Sports		✓	✓	✓	✓	
616	ESPN2 Alternate 3	Sports		✓	✓	✓	✓	
617	ESPN2 Alternate 4	Sports		✓	✓	✓	✓	
1606	ESPN2 HD	Sports	✓	✓	✓	✓	✓	
604	ESPNEWS	News		✓	✓	✓	✓	
1604	ESPNews HD	News	✓	✓	✓	✓	✓	
605	ESPNU	Sports		✓	✓	✓	✓	
1605	ESPNU HD	Sports	✓	✓	✓	✓	✓	
3632	ET-Global	General						
3631	ET-News	General						
562	Eternal Word Television Network (EWTN)	General		✓	✓	✓	✓	✓
3077	EWTN Espanol	General		✓	✓	✓	✓	✓
566	FamilyNet	General		✓	✓	✓	✓	✓
456	Fine Living	General		✓	✓	✓		
466	fit tv	General		✓	✓			✓
890	FLIX	Premium		✓	✓			
452	Food Network	General		✓	✓	✓	✓	✓
1452	Food Network HD	General	✓	✓	✓	✓	✓	✓
211	Fox Business Network	News		✓	✓			
1211	Fox Business Network HD	News	✓	✓	✓			
647	Fox College Sports - Atlantic	Sports		✓				
648	Fox College Sports - Central	Sports		✓				
649	Fox College Sports - Pacific	Sports		✓				
792	Fox Movie Channel	Movies		✓	✓	✓		
210	FOX News Channel	News		✓	✓	✓	✓	
1210	Fox News Channel HD	News	✓	✓	✓	✓	✓	
130	Fox Reality	General		✓	✓	✓		
654	Fox Soccer Channel	Sports		✓	✓			
3303	Fox Sports en Espanol	Sports		✓				

Channel	Channel Name	Category	HD	U450	U300	U200	U100	U-family
655	Fox Sports en Espanol	Sports		✓				
762	FSN Arizona	Sports		✓				
737	FSN Detroit	Sports		✓				
720	FSN Florida	Sports		✓				
748	FSN Midwest - St Louis	Sports		✓				
744	FSN North	Sports		✓				
764	FSN Northwest	Sports		✓				
732	FSN Ohio-Cincinnati	Sports		✓				
734	FSN Ohio-Cleveland	Sports		✓				
730	FSN Pittsburgh	Sports		✓				
774	FSN Prime Ticket	Sports		✓				
760	FSN Rocky Mountain	Sports		✓				
724	FSN South	Sports		✓				
753	FSN Southwest - Dallas	Sports		✓				
772	FSN West	Sports		✓				
536	FUEL TV	General		✓	✓	✓		
535	fuse	General		✓	✓	✓		
128	FX Network	General		✓	✓	✓	✓	
1128	FX Network HD	Sports	✓	✓	✓	✓	✓	
149	G4	General		✓	✓	✓		
1149	G4 HD	General	✓	✓	✓	✓		
3003	Galavision	General		✓	✓	✓		
3683	GMA Pinoy	General						
641	Golf Channel	General		✓	✓	✓		
1641	Golf HD	Sports	✓	✓	✓	✓		
3304	Go!TV	Sports		✓				
656	Go!TV	Sports		✓				
529	Great American Country (GAC)	General		✓	✓	✓		
173	GSN - The Network for Games	General		✓	✓	✓		

Channel	Channel Name	Category	HD	U450	U300	U200	U100	U-family
176	Hallmark Channel	General		✓	✓	✓	✓	✓
794	Hallmark Movie Channel	Movies		✓	✓			✓
1794	Hallmark Movie Channel HD	Movies	✓	✓	✓			✓
802	HBO (Home Box Office)	Premium		✓				
803	HBO (Home Box Office) - West	Premium		✓				
810	HBO Comedy	Premium		✓				
811	HBO Comedy - West	General		✓				
1810	HBO Comedy HD	General	✓	✓				
1811	HBO Comedy HD - West	Premium	✓	✓				
806	HBO Family	Premium		✓				
807	HBO Family - West	General		✓				
1806	HBO Family HD	General	✓	✓				
1807	HBO Family HD - West	Premium	✓	✓				
1802	HBO HD	Premium	✓	✓				
1803	HBO HD - West	Premium	✓	✓				
814	HBO Latino	Premium		✓				
815	HBO Latino - West	General		✓				
1814	HBO Latino HD	Premium	✓	✓				
1815	HBO Latino HD - West	Premium	✓	✓				
808	HBO Signature	Premium		✓				
809	HBO Signature - West	General		✓				
1808	HBO Signature HD	Premium	✓	✓				
1809	HBO Signature HD - West	Premium	✓	✓				
812	HBO Zone	Premium		✓				
813	HBO Zone - West	General		✓				
1812	HBO Zone HD	Premium	✓	✓				
1813	HBO Zone HD - West	Premium	✓	✓				
804	HBO2	Premium		✓				
805	HBO2 - West	Premium		✓				

Channel	Channel Name	Category	HD	U450	U300	U200	U100	U-family
1804	HBO2 HD	General	✓	✓				
1805	HBO2 HD - West	Premium	✓	✓				
1102	HD Theater	Educational	✓	✓	✓	✓	✓	
1105	HDNet	Movies	✓	✓	✓	✓	✓	✓
1106	HDNet Movies	General	✓	✓	✓	✓	✓	✓
1450	HGTV HD	General	✓	✓	✓	✓	✓	✓
270	History	Educational		✓	✓	✓	✓	✓
3104	History en Espanol	Educational						
1270	History HD	Educational	✓	✓	✓	✓	✓	✓
274	History International	Educational		✓	✓	✓		
3055	HITN	General						
450	Home & Garden Television (HGTV)	General		✓	✓	✓	✓	✓
422	Home Shopping Network (HSN)	General		✓	✓	✓	✓	✓
6	Home Shopping Network (HSN)	General		✓	✓	✓	✓	✓
672	HorseRacing TV	Sports		✓				
797	IFC	Movies		✓	✓	✓		
914	IndiePlex	Premium		✓	✓			
564	INSP (Inspiration Network)	General		✓	✓	✓	✓	✓
260	Investigation Discovery	General		✓	✓			
468	ION Life	General		✓	✓			
570	JCTV	General		✓	✓	✓	✓	✓
197	Jewelry Television	General		✓	✓	✓	✓	✓
428	Jewelry Television	General		✓	✓	✓	✓	✓
3056	La Familia Cosmovision	General						
3017	Latele Novela	General						
362	Lifetime Movie Network	Movies		✓	✓	✓	✓	
1362	Lifetime Movie Network HD	Movies	✓	✓	✓	✓	✓	
364	Lifetime Real Women	General		✓	✓	✓		
360	Lifetime Television	General		✓	✓	✓	✓	



Channel	Channel Name	Category	HD	U450	U300	U200	U100	U-family
1360	Lifetime Television HD	General	✓	✓	✓	✓	✓	
183	LOGO	General		✓	✓	✓		
3643	MBC America	General						
1116	MGM HD	Movies	✓					
259	Military Channel	Educational		✓	✓	✓		
276	Military History Channel	Educational		✓	✓	✓		
834	MoreMAX	Premium		✓				
835	MoreMAX - West	General		✓				
1834	MoreMax HD	Premium	✓	✓				
1835	MoreMAX HD - West	Premium	✓	✓				
708	MSG (Madison Square Garden)	Sports		✓	✓	✓	✓	
709	MSG (Madison Square Garden) Alternate 1	Sports		✓	✓	✓	✓	
710	MSG (Madison Square Garden) Alternate 2	Sports		✓	✓	✓	✓	
706	MSG Plus	General		✓	✓	✓	✓	
707	MSG Plus Alternate	General		✓	✓	✓	✓	
502	MTV (Music Television)	General		✓	✓	✓	✓	
1502	MTV (Music Television) HD	General	✓	✓	✓	✓	✓	
509	MTV Hits	General		✓	✓	✓		
508	MTV Jams	General		✓	✓			
3505	MTV Tr3s	General		✓	✓			
506	MTV Tr3s	General		✓	✓			
504	MTV2	General		✓	✓	✓	✓	
510	mtvU	General		✓	✓			
192	mun2	General		✓	✓	✓		
3009	mun2	General		✓	✓	✓		
264	NASA TV	Educational		✓	✓			
265	National Geographic Channel	Educational		✓	✓	✓	✓	✓
1265	National Geographic Channel HD	Educational	✓	✓	✓	✓	✓	✓
630	NFL Network	Sports		✓	✓	✓		

Channel	Channel Name	Category	HD	U450	U300	U200	U100	U-family
1630	NFL Network HD	Sports	✓	✓	✓	✓		
1629	NFL RedZone HD	Sports	✓					
638	NHL Network	Sports		✓				
1638	NHL Network HD	Sports	✓	✓				
315	Nick2	General		✓	✓	✓	✓	✓
314	Nickelodeon	General		✓	✓	✓	✓	✓
1314	Nickelodeon HD	General	✓	✓	✓	✓	✓	✓
316	Nicktoons	General		✓	✓	✓		✓
320	Noggin	General		✓	✓	✓	✓	✓
680	Outdoor Channel	Sports		✓				
1680	Outdoor Channel HD	Sports	✓	✓				
844	OuterMAX	Premium		✓				
1844	OuterMax HD	Premium	✓	✓				
368	Oxygen	General		✓	✓	✓		
1505	Palladia	Premium	✓					
337	PBS Kids Sprout	Educational		✓	✓			✓
3605	Phoenix InfoNews	Local						
3606	Phoenix North America Chinese Channel	Local						
465	Planet Green	General		✓	✓			
1465	Planet Green HD	Educational	✓	✓	✓			
3952	Playboy TV	Adults						
3954	Playboy TV en Espanol	Adults						
328	qubo	General		✓	✓			✓
14	QVC	General		✓	✓	✓	✓	✓
420	QVC	General		✓	✓	✓	✓	✓
1014	QVC HD	General	✓	✓	✓	✓	✓	✓
1420	QVC HD	General	✓	✓	✓	✓	✓	✓
3802	RAITALIA	General						
9000	Retail Barker	Private Access						

Channel	Channel Name	Category	HD	U450	U300	U200	U100	U-family
916	RetroPlex	Premium		✓	✓			
3883	RTR Planeta	Premium						
3662	Saigon Broadcasting Television Network	News						
258	Science Channel	General		✓	✓	✓	✓	✓
1258	Science Channel HD	Educational	✓	✓	✓	✓	✓	✓
657	Setanta Sports	Sports						
424	ShopNBC	General		✓	✓	✓	✓	✓
1789	SHORTS HD	General	✓					
852	Showtime	Premium		✓	✓			
853	Showtime - West	Premium		✓	✓			
860	Showtime Beyond	Premium		✓	✓			
858	Showtime Extreme	Premium		✓	✓			
1858	Showtime Extreme HD	Premium	✓	✓	✓			
1859	Showtime Extreme HD - West	Premium	✓	✓	✓			
862	Showtime Family Zone	Premium		✓	✓			
1852	Showtime HD	Premium	✓	✓	✓			
1853	Showtime HD - West	Premium	✓	✓	✓			
864	Showtime Next	Premium		✓	✓			
856	Showtime Showcase	Premium		✓	✓			
1856	Showtime Showcase HD	Premium	✓	✓	✓			
1857	Showtime Showcase HD - West	Premium	✓	✓	✓			
854	Showtime Too	Premium		✓	✓			
855	Showtime Too - West	Premium		✓	✓			
1854	Showtime Too HD	Premium	✓	✓	✓			
1855	Showtime Too HD - West	Premium	✓	✓	✓			
866	Showtime Women	Premium		✓	✓			
194	Si TV	General		✓	✓	✓		
161	Sleuth	General		✓	✓	✓		
340	Smile of a Child TV	General		✓	✓	✓	✓	✓

Channel	Channel Name	Category	HD	U450	U300	U200	U100	U-family
1118	Smithsonian Channel HD	Educational	✓					
365	SOAPnet	General		✓	✓	✓	✓	
3704	Sony Entertainment Television Asia (SET Asia)	General						
538	Soundtrack Channel (STC)	General		✓	✓	✓		
652	Speed Channel	Sports		✓	✓	✓	✓	
1652	Speed HD	Sports	✓	✓	✓	✓	✓	
145	Spike TV	General		✓	✓	✓	✓	
1145	Spike TV HD	General	✓	✓	✓	✓	✓	
691	Sports Alternate 1	Sports		✓	✓	✓	✓	
1691	Sports HD Alternate 1	Sports		✓	✓	✓	✓	
1692	Sports HD Alternate 2	Sports	✓	✓	✓	✓	✓	
1693	Sports HD Alternate 3	Sports	✓	✓	✓	✓	✓	
1694	Sports HD Alternate 4	General		✓	✓	✓	✓	
1695	Sports HD Alternate 5	Sports	✓	✓	✓	✓		
704	SportsNet New York	Sports		✓	✓	✓		
1704	SportsNet New York HD	Sports	✓	✓	✓	✓		
729	SportSouth	Sports		✓				
735	SportsTime Ohio	Sports		✓				
1735	SportsTime Ohio HD	Sports	✓	✓				
3706	STAR India PLUS	General						
902	Starz	Premium		✓	✓			
903	Starz - West	Premium		✓	✓			
908	Starz Cinema	Premium		✓	✓			
910	Starz Comedy	Premium		✓	✓			
1910	Starz Comedy HD	Premium	✓	✓	✓			
904	Starz Edge	Premium		✓	✓			
1904	Starz Edge HD	Premium	✓	✓	✓			
1902	Starz HD	Premium	✓	✓	✓			
1903	Starz HD - West	Premium	✓	✓	✓			

Channel	Channel Name	Category	HD	U450	U300	U200	U100	U-family
906	Starz inBlack	Premium		✓	✓			
912	Starz Kids & Family	Premium		✓	✓			
1912	Starz Kids & Family HD	Premium	✓	✓	✓			
380	Style Network	General		✓	✓	✓		
1380	Style Network HD	General	✓	✓	✓	✓		
722	Sun Sports	Sports		✓				
798	Sundance Channel	Movies		✓	✓	✓		
3203	SUR	General						
151	Syfy	General		✓	✓	✓	✓	
1151	Syfy HD	General		✓	✓	✓	✓	
54	TBN - Trinity Broadcasting Network	Local		✓	✓	✓	✓	✓
560	TBN - Trinity Broadcasting Network	Local		✓	✓	✓	✓	✓
3078	TBN Enlace USA	General						
112	TBS	General		✓	✓	✓	✓	
113	TBS - West	General		✓	✓	✓	✓	
1112	TBS HD	Movies	✓	✓	✓	✓	✓	
3506	Telehit	General						
565	The Church Channel	General		✓	✓	✓	✓	✓
3682	The Filipino Channel	General						
250	The Learning Channel (TLC)	Educational		✓	✓	✓	✓	
1250	The Learning Channel HD	Educational	✓	✓	✓	✓	✓	
882	The Movie Channel (TMC)	Premium		✓	✓			
883	The Movie Channel (TMC) - West	Premium		✓	✓			
1883	The Movie Channel (TMC) HD - West	Premium	✓	✓	✓			
1882	The Movie Channel HD	Premium	✓	✓	✓			
322	The N	General		✓	✓	✓	✓	✓
642	The Sportsman Channel (TSC)	Sports		✓				
225	The Weather Channel	News		✓	✓	✓	✓	✓
1225	The Weather Channel HD	General	✓	✓	✓	✓	✓	✓

Channel	Channel Name	Category	HD	U450	U300	U200	U100	U-family
575	The Word Network	General		✓	✓	✓	✓	✓
838	ThrillerMAX	Premium		✓				
839	ThrillerMAX - West	General		✓				
1838	ThrillerMax HD	Premium	✓	✓				
1839	ThrillerMAX HD - West	Premium	✓	✓				
884	TMC Xtra	Premium		✓	✓			
1884	TMC Xtra HD	Premium	✓	✓	✓			
1885	TMC Xtra HD - West	Premium	✓	✓	✓			
108	TNT (Turner Network Television)	General		✓	✓	✓	✓	
109	TNT (Turner Network Television) - West	General		✓	✓	✓	✓	
1108	TNT HD	Movies	✓	✓	✓	✓	✓	
254	Travel Channel	Educational		✓	✓	✓	✓	
1254	Travel Channel HD	Educational	✓	✓	✓	✓	✓	
164	truTV	General		✓	✓	✓	✓	
165	truTV - West	General		✓	✓	✓	✓	
790	Turner Classic Movies (TCM)	Movies		✓	✓	✓		
3703	TV Asia	General						
3680	TV Japan	General						
138	TV Land	General		✓	✓	✓	✓	
157	TV One	General		✓	✓	✓		
3862	TV Polonia	General						
3832	TV5MONDE	General						
3664	TVB-V	General						
670	TVG Network	Sports		✓				
3863	TVP Info	General						
1104	Universal HD	Movies	✓					
5101	URGE 1 - TRL	General		✓	✓	✓		
5110	URGE 10 - Solid Gold Oldies	General		✓	✓	✓		
5111	URGE 11 - Discotech	General		✓	✓	✓		

Channel	Channel Name	Category	HD	U450	U300	U200	U100	U-family
5112	URGE 12 - Dance Club	General		✓	✓	✓		
5113	URGE 13 - Electronica	General		✓	✓	✓		
5114	URGE 14 - MTV2	General		✓	✓	✓		
5115	URGE 15 - Rock Legends	General		✓	✓	✓		
5116	URGE 16 - Arena Rock	General		✓	✓	✓		
5117	URGE 17 - Alternative Rock	General		✓	✓	✓		
5118	URGE 18 - Adult Rock	General		✓	✓	✓		
5119	URGE 19 - MTV2 HB	General		✓	✓	✓		
5102	URGE 2 - Todays Top 40	General		✓	✓	✓		
5120	URGE 20 - R&B Hits	General		✓	✓	✓		
5121	URGE 21 - Classic R&B	General		✓	✓	✓		
5122	URGE 22 - Classic Rap	General		✓	✓	✓		
5123	URGE 23 - Modern Rap	General		✓	✓	✓		
5124	URGE 24 - Modern Soul	General		✓	✓	✓		
5125	URGE 25 - CMT Radio	General		✓	✓	✓		
5126	URGE 26 - Bluegrass	General		✓	✓	✓		
5127	URGE 27 - Classic Country	General		✓	✓	✓		
5128	URGE 28 - Wide Open Ctry	General		✓	✓	✓		
5129	URGE 29 - Reggae	General		✓	✓	✓		
5103	URGE 3 - Urban POP	General		✓	✓	✓		
5130	URGE 30 - Latin Jazz	General		✓	✓	✓		
5131	URGE 31 - Radio Alterna	General		✓	✓	✓		
5132	URGE 32 - Tejano	General		✓	✓	✓		
5133	URGE 33 - Smooth Jazz	General		✓	✓	✓		
5134	URGE 34 - Classic Jazz	General		✓	✓	✓		
5135	URGE 35 - Blues	General		✓	✓	✓		
5136	URGE 36 - Easy Listening	General		✓	✓	✓		
5137	URGE 37 - Classical	General		✓	✓	✓		
5138	URGE 38 - Christian	General		✓	✓	✓		

Channel	Channel Name	Category	HD	U450	U300	U200	U100	U-family
5139	URGE 39 - Gospel	General		✓	✓	✓		
5104	URGE 4 - Modern POP	General		✓	✓	✓		
5140	URGE 40 - POP Standards	General		✓	✓	✓		
5141	URGE 41 - Jazzup Broadway	General		✓	✓	✓		
5142	URGE 42 - Cinema	General		✓	✓	✓		
5143	URGE 43 - Noggin	General		✓	✓	✓		
5144	URGE 44 - Nick Kids	General		✓	✓	✓		
5145	URGE 45 - Dream Sequence	General		✓	✓	✓		
5146	URGE 46 - Swing	General		✓	✓	✓		
5147	URGE 47 - Showcase	General		✓	✓	✓		
5148	URGE 48 - Comedy	General		✓	✓	✓		
5105	URGE 5 - Cover to Cover	General		✓	✓	✓		
5106	URGE 6 - Soft POP	General		✓	✓	✓		
5107	URGE 7 - I Love the 70s	General		✓	✓	✓		
5108	URGE 8 - I Love the 80s	General		✓	✓	✓		
5109	URGE 9 - I Love the 90s	General		✓	✓	✓		
124	USA Network	General		✓	✓	✓	✓	
1124	USA Network HD	General	✓	✓	✓	✓	✓	
3015	V-me	General						
640	VERSUS	Sports		✓	✓	✓		
1640	VERSUS HD	Sports	✓	✓	✓	✓		
518	VH1	General		✓	✓	✓	✓	
520	VH1 Classic	General		✓	✓	✓		
1518	VH1 HD	General	✓	✓	✓	✓	✓	
521	VH1 Soul	General		✓	✓			
7	WABC-7 (ABC)	Local		✓	✓	✓	✓	✓
1007	WABC-HD-7 (ABC)	Local	✓	✓	✓	✓	✓	✓
3013	WAPA America	General						
2	WCBS-2 (CBS)	Local		✓	✓	✓	✓	✓



Channel	Channel Name	Category	HD	U450	U300	U200	U100	U-family
1002	WCBS-HD-2 (CBS)	Local	✓	✓	✓	✓	✓	✓
12	WCTX-59 (MY NETWORK TV)	General		✓	✓	✓	✓	✓
1012	WCTX-HD-59 (MY NETWORK TV)	Local	✓	✓	✓	✓	✓	✓
372	We (Womens Entertainment)	General		✓	✓	✓		
470	Wealth TV	General		✓	✓	✓		
1470	Wealth TV HD	General	✓	✓	✓	✓		
49	WEDW-49 (PBS)	Local		✓	✓	✓	✓	✓
66	WFME-66 (IND)	Local		✓	✓	✓	✓	✓
3	WFSB-3 (CBS)	Local		✓	✓	✓	✓	✓
1003	WFSB-HD-3 (CBS)	Local	✓	✓	✓	✓	✓	✓
68	WFUT-68 (TF)	Local		✓	✓	✓	✓	✓
180	WGN America	General		✓	✓	✓	✓	
1180	WGN America HD	General	✓	✓	✓	✓	✓	
21	WLIW-21 (PBS)	Local		✓	✓	✓	✓	✓
842	WMAX	Premium		✓				
1842	WMAX HD	Premium	✓	✓				
4	WNBC-4 (NBC)	Local		✓	✓	✓	✓	✓
1004	WNBC-HD-4 (NBC)	Local	✓	✓	✓	✓	✓	✓
13	WNET-13 (PBS)	Local		✓	✓	✓	✓	✓
1013	WNET-HD-13 (PBS)	Local	✓	✓	✓	✓	✓	✓
50	WNJN-50 (PBS)	Local		✓	✓	✓	✓	✓
47	WNJU-47 (TEL)	Local		✓	✓	✓	✓	✓
25	WNYE-25 (PBS)	Local		✓	✓	✓	✓	✓
39	WNYN-39 (AZTECA)	General		✓	✓	✓	✓	✓
5	WNYW-5 (FOX)	Local		✓	✓	✓	✓	✓
1005	WNYW-HD-5 (FOX)	Local	✓	✓	✓	✓	✓	✓
578	World Harvest Television	General		✓	✓	✓	✓	✓
11	WPIX-11 (THE CW)	Local		✓	✓	✓	✓	✓
1011	WPIX-HD-11 (THE CW)	Local		✓	✓	✓	✓	✓

Channel	Channel Name	Category	HD	U450	U300	U200	U100	U-family
31	WPXN-31 (ION)	Local		✓	✓	✓	✓	✓
43	WSAH-43 (IND)	Local		✓	✓	✓	✓	✓
61	WTIC-61 (FOX)	Local		✓	✓	✓	✓	✓
1061	WTIC-HD-61 (FOX)	Local	✓	✓	✓	✓	✓	✓
8	WTNH-8 (ABC)	Local		✓	✓	✓	✓	✓
1008	WTNH-HD-8 (ABC)	Local	✓	✓	✓	✓	✓	✓
20	WTXX-20 (THE CW)	Local		✓	✓	✓	✓	✓
1020	WTXX-HD-20 (THE CW)	Local	✓	✓	✓	✓	✓	✓
30	WVIT-30 (NBC)	Local		✓	✓	✓	✓	✓
1030	WVIT-HD-30 (NBC)	Local	✓	✓	✓	✓	✓	✓
9	WWOR-9 (MY NETWORK TV)	Local		✓	✓	✓	✓	✓
1009	WWOR-HD-9 (MY NETWORK TV)	Local	✓	✓	✓	✓	✓	✓
41	WXTV-41 (UNI)	Local		✓	✓	✓	✓	✓
703	YES Alternate	Sports		✓	✓	✓	✓	
1702	YES HD	Sports	✓	✓	✓	✓	✓	
702	YES Network	Sports		✓	✓	✓	✓	
3702	Zee TV	General						